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No. 89-———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SEATTLE-FIRST NATIONAL BANK,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD; FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, LOCAL NO. 1182, CHARTERED BY UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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March 20, 1990

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QUESTIONS PRESENTED FOR REVIEW

In an earlier opinion in this case, *National Labor Relations Board v. Financial Institution Employees of America, Local 1182*, 475 U.S. 192 (1986) (*"FIEA"*), this Court wrote that the National Labor Relations Board should consider the "administrative or organizational changes" resulting from affiliation in deciding whether a newly affiliated union succeeds to the bargaining rights of a predecessor. This case presents three questions related to that opinion:

1. Whether the Board's method of determining if a new affiliate is the continuation of a previously certified union, a method that invariably results in findings of continuity because it ignores the shifts of power that demonstrate important changes in organizational identity, conflicts with the guidelines set forth in *FIEA*.

2. Whether the Board's method of analyzing post-affiliation continuity is irrational and conflicts with this Court's opinion in *FIEA* because it fails to ask if unit employees view the affiliation as effecting important changes in organizational identity.

3. Whether the Board can, consistent with *FIEA*, properly deprive an employer of the ability to present evidence of post-affiliation administrative or organizational changes that occur prior to the Board's final adjudication of charges that the employer has refused to bargain with the new affiliate.

LIST OF PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATES

Seattle-First National Bank is a wholly owned subsidiary of Seafirst Corporation, which is, in turn, a wholly owned subsidiary of BankAmerica Corporation. All of Seattle-First National Bank's subsidiaries are wholly owned, excluding director qualifying shares in certain instances. BankAmerica Corporation's subsidiaries (except wholly owned subsidiaries) are BA Servicios, S.A., and East Kemptville Tin Corporation. Should the Court desire disclosure of wholly owned subsidiaries of BankAmerica Corporation, Seattle-First National Bank will supplement its list of subsidiaries and affiliates.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTES AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	8
I. THE DECISION BELOW PERPETUATES A CONFLICT AMONG THE CIRCUITS ON AN IMPORTANT QUESTION LEFT OPEN BY THIS COURT'S PREVIOUS OPINION	10
II. THE DECISION BELOW IMPROPERLY DECLINES TO CONSIDER EMPLOYEE SENTIMENT IN EXAMINING CONTINUITY, THUS PERPETUATING CONFUSION AS TO THE MEANING OF THE COURT'S PRIOR OPINION	20
III. THE DECISION BELOW PLACES IMPROPER TEMPORAL LIMITS ON THE CONTINUITY INQUIRY	24
CONCLUSION	27

TABLE OF CONTENTS—Continued

APPENDIX Page

A. Opinion of the United States Court of Appeals for Ninth Circuit, December 20, 1989 ..... 1a

B. Order of the National Labor Relations Board Denying Motion, September 29, 1988 ..... 22a

C. Decision and Order of the National Labor Relations Board, July 29, 1988 ..... 24a

D. Opinion of the Supreme Court of the United States, February 26, 1986 ..... 34a

E. Decision and Order of the National Labor Relations Board, September 28, 1979 ..... 54a

F. Decision and Amendment of Certification of the National Labor Relations Board, April 5, 1979.... 64a

G. RCIU Constitution (Exhibit E-1), excerpts 70a

TABLE OF AUTHORITIES

CASES Page

American Bridge Division, United States Steel Corp. v. NLRB, 457 F.2d 660 (3d Cir. 1972) ..11, 12, 20
Amoco Production Co. v. NLRB, 613 F.2d 107 (5th Cir. 1980) 6
Bunker Hill Co., 197 N.L.R.B. 334 (1972) 23
Bunker Hill Co., 208 N.L.R.B. 27 (1973) 16
East Dayton Tool & Die Co., 190 N.L.R.B. 577 (1971) 11
East Ohio Gas Co., 140 N.L.R.B. 1269 (1963) 11
Financial Institution Employees of America, Local No. 1182 v. NLRB, 752 F.2d 356 (9th Cir. 1984), *rehearing denied*, 750 F.2d 757 (9th Cir. 1984) 6, 7
Ford Motor Credit Co., No. 19-RC-9042 (Sept. 7, 1978) 18
Garlock Equipment Co., 288 N.L.R.B. No. 31 (Mar. 25, 1988) 14, 21, 24
Garlock Equipment Co. v. NLRB, 709 F.2d 722 (D.C. Cir. 1983) 13
Hammond Publishers, Inc., 286 N.L.R.B. No. 6 (Sept. 30, 1987) 9
Hamilton Tool Co., 190 N.L.R.B. 571 (1971) 11
Hansen v. Guyette, 814 F.2d 547 (8th Cir. 1987).. 16
Harbor Carriers of the Port of New York v. NLRB, 306 F.2d 89 (2d Cir. 1962), *cert. denied sub nom. Deck Scow Captains Local 335, Independent v. Harbor Carriers of the Port of New York*, 372 U.S. 917 (1963) 18
Independent Drug Store Owners of Santa Clara County, 211 N.L.R.B. 701 (1974), *aff'd sub nom. Retail Store Employees, Local 428 v. NLRB*, 528 F.2d 1225 (9th Cir. 1975) 12
Insulfab Plastics, Inc., 274 N.L.R.B. No. 126 (1985), *enforced*, 789 F.2d 961 (1st Cir. 1986).. 9
J.H. Day Co., 204 N.L.R.B. 863 (1973) 11
Jasper Seating Co., 231 N.L.R.B. 1025 (1977) 12
May Department Stores Company v. NLRB, 1990 U.S. App. LEXIS 2964 (7th Cir. Feb. 28, 1990).. 9, 12, 13, 16

TABLE OF AUTHORITIES—Continued

Page

Missouri Beef Packers, Inc., 175 N.L.R.B. 1100 (1969) 14
Mosler Safe Co, 210 N.L.R.B. 934 (1974) 23
NLRB v. Bernard Gloekler North East Co., 540 F.2d 197 (3d Cir. 1976) 11
NLRB v. Cutter Dodge, Inc., 825 F.2d 1375 (9th Cir. 1987) 26
NLRB v. Financial Institution Employees of America, Local No. 1182, 475 U.S. 192 (1986) ..... *passim*
NLRB v. Insulfab Plastics, Inc., 789 F.2d 961 (1st Cir. 1986) 12, 13
National Posters, Inc. v. NLRB, 885 F.2d 175 (4th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3397 (U.S. Dec. 11, 1989) (No. 89-914) 21
North Electric Co., 165 N.L.R.B. 942 (1967) 10
Ocean Systems Inc., 223 N.L.R.B. 857 (1976) 12
Peco, Inc., 204 N.L.R.B. 1036 (1973) 11
St. Vincent Hospital v. NLRB, 621 F.2d 1054 (10th Cir. 1980) 12
Seattle-First National Bank, 241 N.L.R.B. 751 (1979) 5
Seattle-First National Bank, 245 N.L.R.B. 700 (1979) 6, 25
Seattle-First National Bank, 265 N.L.R.B. 426 (1982) 6
Seattle-First National Bank, 290 N.L.R.B. No. 72 (July 29, 1988) ..... *passim*
Seattle-First National Bank v. NLRB, 892 F.2d 792 (9th Cir. 1989) ..... *passim*
Sun Oil Co. of Pa. v. NLRB, 576 F.2d 553 (3d Cir. 1978) 11, 13
United Food and Commercial Workers v. Local 919, 104 L.R.R.M. 2089 (D. Conn.), *aff'd mem.*, 614 F.2d 1291 (2d Cir. 1979) 16
United Hydraulics Corp., 205 N.L.R.B. 62 (1973) .. 22
Western Commercial Transport, 288 N.L.R.B. No. 27 (Mar. 25, 1988) 14, 21, 24

TABLE OF AUTHORITIES—Continued

STATUTES Page

28 U.S.C. § 1254(1) 1
29 U.S.C. § 157 ..... 2, 9
29 U.S.C. § 159(a) 2, 9
29 U.S.C. § 159(c) 9, 21
29 U.S.C. § 160(f) 7

REGULATIONS AND RULES

29 C.F.R. § 102.48(d) 26
29 C.F.R. § 102.60(b) 2

OTHER AUTHORITIES

G. Chaison, *When Unions Merge* (D.C. Heath & Co. 1986) 17
Conant and Kaserman, "Union Merger Incentives and Pecuniary Externalities," *Journal of Labor Research*, Vol. X, No. 3 (Summer 1989) 10
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"The UAW Takes on Mack—and Its Own Members," *Business Week* (March 23, 1987) at 116H 17

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Seattle-First National Bank respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 20, 1989.

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 892 F.2d 792 (9th Cir. 1989). It is found in the Appendix at page 1a. The Decision and Order of the National Labor Relations Board is reported at 290 N.L.R.B. No. 72, and it appears in the Appendix at page 24a.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on December 20, 1989. The Petition for a Writ of Certiorari has been filed within 90 days thereafter. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 7 of the National Labor Relations Act (the "Act"), 29 U.S.C. § 157, provides, in pertinent part:

> Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . .

Section 9(a) of the Act, 29 U.S.C. § 159(a), provides, in pertinent part:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . .

Section 102.60(b) of the Rules and Regulations of the National Labor Relations Board, 29 C.F.R. § 102.60(b), provides, in pertinent part:

> *Petition for clarification of bargaining unit or petition for amendment of certification under Section 9(b) of the Act; who may file; where to file; withdrawal.* . . . [A] petition for amendment of certification, in the absence of a question concerning representation, may be filed by a labor organization or by an employer . . .

STATEMENT OF THE CASE

This case arises out of the same affiliation election that gave rise to *NLRB v. Financial Institution Employees of America, Local No. 1182*, 475 U.S. 192 (1986) (*"FIEA"*). In that election, members of the Firstbank Independent Employees Association (the "Independent"), voted to affiliate with the Retail Clerks International

Union ("RCIU"). The affiliation resulted in creation of of a new chartered local of the RCIU, Local 1182. The new affiliate then demanded that Seattle-First National Bank ("Seafirst") bargain with it as the exclusive bargaining representative of its employees. Like *FIEA*, this case arises from Seafirst's contention that Local 1182 is not entitled to succeed to the Independent's bargaining rights in the absence of an election conducted by the National Labor Relations Board.

1. Seafirst is a national banking association headquartered in Washington state. From 1938 until 1969, an independent association represented the Bank's employees. That assosciation in 1969 affiliated with the Marine Engineers Beneficial Association ("MEBA"). A year later, the National Labor Relations Board conducted an election in which employees ousted MEBA in favor of the Independent, an unaffiliated entity, which was certified as the exclusive bargaining representative of unit employees on November 30, 1970. The Bank and the Independent negotiated a three-year agreement in November of 1971, and entered into another three-year contract in August of 1974. The second agreement expired on October 30, 1977, and bargaining for a new contract extended into 1978.

In early 1978, the Independent submitted to its members the question of an affiliation with the RCIU. In mail balloting conducted in February of 1978, 1206 union members voted in favor of the affiliation, while 774 members voted against. The union did not permit 2166 unit employees to vote—more than 45% of the bargaining unit—because they were not union members. Based upon these results, the RCIU issued a charter to Local 1182, effective April 1, 1978.

2. The affiliation caused sweeping changes in the organization, control and character of the union. Before the affiliation, the Independent answered to no other entity. After the affiliation, however, the RCIU had consider-

able authority over its new affiliate. For example, Local 1182 had no power to order a strike without approval from the International. RCIU Constitution (Ex. E-1, hereafter "Const.") §§ 8(B), 32(E).[1] Copies of the local's bargaining proposals were required to be submitted to the International, at its request, for approval. Const. § 32(D)(2). Whatever power remained with the local after affiliation existed only by sufferance of the International. Thus, the local's very authority to adopt bylaws resulted from a "grant" of power to the locals by the International. Exemplary Bylaws (Ex. P-29), Preface. And the RCIU Constitution permitted locals to adopt bylaws only if consistent with the Constitution and approved by the International. Const. § 24(A).

What the RCIU could "grant," it could take away. The International thus had the discretionary power to place a local in trusteeship, Const. §§ 9(K)(1), 9(K)(2)(e), to "immediately suspend . . . from membership or office" any individual involved in "a situation imminently dangerous to the welfare or best interests of the International Union," Const. § 9(L), and to order Local 1182 to cease any activities deemed inimical to "the best interest of the International Union . . ." Const. § 9(M). Employees belonging to the Independent suddenly found themselves bound to "abide by and conform with all provisions of the Constitution and laws of the International . . ." Const. § 24(C). Further, the International immediately expanded the local's jurisdiction to embrace financial institutions generally in the State of Washington, instead of just Seafirst. *See* Ex. E-5.

The International's control over Local 1182 extended even to day-to-day business activities. The Constitution restricted the local's employment of legal counsel, prohibited solicitation of financial assistance from other sources without International approval, required approval

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[1] Relevant excerpts from the RCIU Constitution appear in the Appendix at page 70a.

of the Local's bookkeeping system, required monthly financial reports to the International, and allowed the International to audit the local's books at will. Const. §§ 24 (E), 24(B), 26(G)(2), 27(A), 28(H), 11(N). The International had control over the dues the local could charge, Const. § 30(A), and it could levy assessments, fees and per capita taxes on the local. Const. §§ 8(A)(3), 18(A).

3. In June of 1978, the new RCIU affiliate petitioned the National Labor Relations Board to amend the Board's certification of bargaining representative by substituting Local 1182 for the Independent. The Bank resisted, arguing that (1) the affiliation election offended the Board's "due process" rules because the Independent had deprived more than two thousand bargaining unit employees of the opportunity to vote; and (2) the certification could not be amended without a Board-conducted election because there was no continuity of representative, *i.e.*, the affiliation had created a new and different union, raising a question concerning representation that only a Board election could resolve. After a hearing in July of 1978, the Board issued a decision to amend the certification as requested by Local 1182. *Seattle-First National Bank*, 241 N.L.R.B. 751 (1979) (App. 64a). To obtain judicial review of that decision, the Bank thereafter refused to bargain. The Board's General Counsel, in turn, issued an unfair labor practice complaint.

4. By mid-1979, when the unfair labor practice charge was pending, Seafirst had evidence that Local 1182 had undergone further changes after the 1978 hearing. Specifically, the Bank learned that there was 100% turnover in union officers in the year following the affiliation; that Local 1182 had moved into the Seattle offices of the International; that Local 1182 had not yet adopted a constitution or bylaws; that elections scheduled for the spring of 1979 had not been held, leaving doubt as to the authority of the exsiting officers; that Local 1182 was already organizing beyond the Independent's jurisdiction; and that

hundreds of Seafirst employees had signed petitions protesting their exclusion from the affiliation vote. Versoi Affidavit (June 29, 1979), attached to CR 17. In addition to these changes at the local level, in 1979 the RCIU merged with the Amalgamated Meatcutters and Butcher Workmen to form the United Food and Commercial Workers International Union (the "UFCW").

After filing an affidavit detailing these known changes, the Bank asked the Board to issue a subpoena to allow further discovery, and requested a supplemental hearing to explore this new evidence. The Board, however, denied the Bank's requests for a subpoena and a hearing, granted the General Counsel's motion for summary judgment, and found that the Bank had violated the Act by refusing to bargain. *Seattle-First National Bank*, 245 N.L.R.B. 700 (1979) (App. 54a). The Bank immediately sought review. *Seattle-First National Bank v. NLRB*, No. 79-7515 (9th Cir.). Before submission of the case, however, the Board asked that the Ninth Circuit remand the matter for consideration in connection with a remand in a similar case, *Amoco Production Co. v. NLRB*, 613 F.2d 107 (5th Cir. 1980).

On this first remand, the Board reversed its earlier decision and dismissed the unfair labor practice charge against Seafirst, holding that the Independent had improperly excluded nonunion employees from the affiliation vote. *Seattle-First National Bank*, 265 N.L.R.B. 426 (1982). On the Union's petition for review, the Ninth Circuit reversed and held that the Board could not require the union to permit nonmembers to participate in the vote. *Financial Institution Employees of America, Local 1182 v. NLRB*, 752 F.2d 356 (9th Cir. 1984).[2] This Court then granted certiorari to resolve a conflict among

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[2] Seven Ninth Circuit judges, led by Justice Kennedy, dissented from the court's denial of rehearing *en banc*. *See Financial Institution Employees of America, Local 1182 v. NLRB*, 750 F.2d 757 (9th Cir. 1984) (opinions on denial of rehearing).

the circuits, and affirmed the Ninth Circuit. *NLRB v. Financial Institution Employees of America, Local 1182*, 475 U.S. 192 (1986) (*"FIEA"*).

5. Both the Ninth Circuit and this Court initially declined to review the "continuity" issue in this case, i.e., the question whether affiliation had created a new and different union that was not entitled automatically to succeed to the Independent's bargaining rights. 752 F.2d at 359 n.4; 475 U.S. at 200 n.7 (App. 43a). Thus, on remand in 1986, Seafirst again asked that the Board conduct the fact finding necessary to resolve the continuity issue. The Board, without noting that the case was before it on the General Counsel's 1979 summary judgment motion, held no hearing on the factual issues raised by the 1979 Versoi Affidavit. Instead, the Board relied on the record developed in July of 1978, at a time when the new affiliate had been functioning not even six months, ruled that continuity existed, and ordered the Bank to bargain. *Seattle-First National Bank*, 290 N.L.R.B. No. 72 (July 29, 1988) (App. 24a). Because the Board's decision referred to evidentiary "gaps," the Bank moved for reconsideration, requesting a hearing to fill those gaps and to address the issues it had raised in 1979. The Board denied that motion. Order Denying Motion (Sept. 29, 1988) (App. 22a).

The Bank then petitioned for review under 29 U.S.C. § 160(f), and the Board cross petitioned for enforcement. At the same time, the Bank's counsel learned that in the spring of 1988, Local 1182 had merged with another local, further diminishing continuity with the Independent. The Bank asked the Ninth Circuit to consider this evidence through expansion of the record, judicial notice or remand for the taking of evidence before the Board. *See* Motion to Supplement the Record or, in the Alternative, for Remand (Feb. 8, 1989). On December 20, 1989, a panel of the court of appeals denied the motion to supplement, denied the petition for review and enforced the

Board's decision. The Court ruled that the Board (1) had properly refused to consider evidence proffered by Seafirst after the 1978 hearing, 892 F.2d at 796-97 (App. 9a-11a); (2) had properly concluded that Local 1182 was the same union as the Independent, 892 F.2d at 801 (App. 20a); and (3) had properly refused to consider evidence of employee sentiment in reaching its continuity conclusion, 892 F.2d at 801 (App. 20a).

REASONS FOR GRANTING THE WRIT

In its current posture, this case presents important and recurring issues pertaining to the Board's application of its "continuity" test. This Court declined to resolve those issues in 1986; with the passage of time, it has become apparent that the Court should squarely address the continuity inquiry in order to:

(1) Resolve an intercircuit conflict over the appropriate test to be applied in analyzing continuity. The Third Circuit has developed a test that properly focuses on issues of power and control, in contrast to the superficial administrative factors considered by the Board, with the approval of several circuits;

(2) Clarify confusion arising out of the Court's 1986 decision as to whether an examination of employee sentiment has a role in considering continuity. This Court's opinion recognized that post-affiliation changes are relevant to the extent that they affect the relationship between the union and the employees it represents. The best judges on that issue are the employees themselves, and evidence of their views is a necessary component of any rational inquiry; and

(3) Define the temporal limits of the Board's continuity inquiry. The Board and the court below assert that an employer should not be entitled to present evidence of changes caused by affiliation once the books have closed on the first post-affiliation hearing. That ruling finds no support in *FIEA*, and unnecessarily limits the nature of the inquiry contemplated by this Court's decision.

These issues arise from the most basic provisions of the National Labor Relations Act. Section 7 of the Act, 29 U.S.C. § 157, guarantees employees the right "to bargain collectively through representatives of their own choosing." Once chosen by a majority of the employees in an appropriate unit, the bargaining representative "shall be the exclusive representative of all the employees in such unit for purposes of collective bargaining." 29 U.S.C. § 159(a). In this case, the Board in 1970 conducted an election in which the Independent emerged the victor. *See* 29 U.S.C. § 159(c) (discussing Board certification of election results). Seafirst thereafter had no obligation to bargain with any other union—indeed, it would have been unlawful for Seafirst to do so.

Local 1182 of the RCIU in early 1978 approached Seafirst and demanded that it bargain. If the new RCIU affiliate was a *different* union from the Independent, then Seafirst was no more obliged to bargain than it would have been with any other outsider. The question in this case, as with many affiliation cases, thus boils down to whether Local 1182 was the same union as the Independent or a new and different entity. If it turns out to be a new and different union, Section 7 of the Act, 29 U.S.C. § 157, demands that employees be entitled to vote before having that new bargaining representative thrust upon them. In deciding that issue, the Board applied legal tests that were, in several respects, at odds with the Act, as interpreted by this Court.

These issues have great importance in the Board's administration of the Act. Both the Board and the courts of appeal confront affiliation questions with regularity. *See, e.g., May Department Stores Company v. NLRB*, 1990 U.S. App. LEXIS 2964 (7th Cir. Feb. 28, 1990); *Insulfab Plastics, Inc.*, 274 N.L.R.B. No. 126 (1985), *enforced*, 789 F.2d 961 (1st Cir. 1986); *Hammond Publishers, Inc.*, 286 N.L.R.B. No. 6 (Sept 30, 1987). In part because of difficulties encountered by unions in organizing

efforts, mergers and affiliations have become more common organizational tools in the last two decades. The rising trend in merger activity ((loosely defined to include affiliations) likely will "have profound effects on future bargaining structures." Conant and Kaserman, "Union Merger Incentives and Pecuniary Externalities," *Journal of Labor Research*, Vol. X, No. 3 (Summer 1989) at 243. The Court should not allow that activity to proceed in uncertainty over the appropriate tests and in the shadow of a conflict among the circuits.

I. THE DECISION BELOW PERPETUATES A CONFLICT AMONG THE CIRCUITS ON AN IMPORTANT QUESTION LEFT OPEN BY THIS COURT'S PREVIOUS OPINION.

In its 1986 decision, this Court noted that "[t]he parties disagree over whether affiliation substantially changed the union in this case. See Brief for NLRB 4, and n.2; Brief for FIEA 4." *FIEA*, 475 U.S. at 200, n.7 (App. 42a). Because the Board's 1982 decision contained no continuity finding, this Court declined to address the issue. *Id.* The Court did offer a general commentary on the Board's historical approach to continuity, which the Board and the courts have since looked to for guidance in considering continuity. That commentary, however, has failed to resolve an important intercircuit conflict as to whether the continuity test as applied to affiliations should focus on day-to-day administrative factors, as the Board and several circuit courts have held, or transfers of power and control effected through affiliation, as the Third Circuit has held.

A. The seeds for the intercircuit conflict were planted in the late 1960s, when the Board established its two-pronged test pertaining to mergers and affiliations, under which it examined the "due process" of an affiliation or merger election, as well as the "continuity" of the resulting union. *See North Electric Co.*, 165 N.L.R.B. 942

(1967); *J.H. Day Co.*, 204 N.L.R.B. 863 (1973) (invalidated on due process grounds); *Peco, Inc.*, 204 N.L.R.B. 1036 (1973) (same). The Board sometimes concluded that union mergers did not pass muster under the continuity prong of this test. As far as Seafirst can determine, however, the Board never refused to recognize an affiliation, i.e., an arrangement in which an independent union became associated as a freestanding local of a pre-existing international, on grounds of discontinuity. *See, e.g., East Ohio Gas Co.*, 140 N.L.R.B. 1269, 1270 (1963); *Hamilton Tool Co.*, 190 N.L.R.B. 571 (1971) *East Dayton Tool and Die Co*, 190 N.L.R.B. 577 (1971).

By 1972, however, the Third Circuit had found flaws in the Board's perfunctory analysis of post-affiliation continuity. In *American Bridge Division, United States Steel Corp. v. NLRB*, 457 F.2d 660 (3rd Cir. 1972), that court held that an affiliation that caused a "change in the fulcrum of union control and representation" away from the local level raised a question of the new affiliate's representative status that could be settled only in a Board-conducted representation election. 457 F.2d at 663-64. The Third Circuit refined its approach to continuity in *Sun Oil Co. v. NLRB*, 576 F.2d 553 (3rd Cir. 1978), a case even more closely analogous to this one. In *Sun Oil*, two independents upon affiliation became subject to the international constitution, which provided for ultimate international authority over strikes, a per capita tax payable to the international, an audit of the independent's books and records by the international, and mandatory support for the international's policies. *Id.* at 557. Because of these shifts in control, the court in *Sun Oil* determined that the locals "were distinct and new bargaining representatives with which the Company had no obligation to bargain until the Locals were certified by the Board." *Id. See also NLRB v. Bernard Gloekler Northeast Co.*, 540 F.2d 197, 202 (3rd Cir. 1976).

At the same time, the Third Circuit's view began to make inroads at the Board, as several Board members, at one time or another, adopted its approach. *See Jasper Seating Co.*, 231 N.L.R.B. 1025, 1027-28 (1977) (Member Penello, concurring); *Ocean Systems, Inc.*, 223 N.L.R.B. 857, 862 (1976) (Member Walther, dissenting); *Independent Drug Store Owners of Santa Clara County*, 211 N.L.R.B. 701, n.2 (1974) (Chairman Miller, concurring) *aff'd sub nom. Retail Store Employees, Local 428 v. NLRB*, 528 F.2d 1225 (9th Cir. 1975). The Board majority never adopted the Third Circuit doctrine, however, and other courts either ignored it or distinguished the cases on their facts. *See, e.g., St. Vincent Hospital v. NLRB*, 621 F.2d 1054, 1058 (10th Cir. 1980).

The continuity issue was thus joined. By 1977, however, the focus of the affiliation debate shifted away from continuity and toward due process. That issue dominated affiliation cases until 1986, when this Court in *FIEA* resolved the due process question and ruled that nonmembers need not be allowed to vote in affiliation elections.

B. Given that the due process test now operates as only a limited second-check, one might expect heightened scrutiny of continuity, along the lines of the Third Circuit doctrine, to protect fully the interests of those who lost the vote under *FIEA*. In fact, however, other courts of appeal, including the court below, still reject the Third Circuit's view. *See Seattle-First National Bank*, 892 F.2d at 789 (App. 13a); *Insulfab Plastics*, 789 F.2d at 967; *May Department Stores*, 1990 U.S. App. LEXIS 2964, at 22.

The court below attempted to minimize its conflict with the Third Circuit, characterizing *American Bridge* and its progeny as being at odds with this Court's 1986 decision. The Ninth Circuit recalled this Court's view "that increased size, financial support and bargaining power are the very reasons why independent unions join internationals." 892 F.2d at 798 (App. 13a). Implying that the Third Circuit relied on only these factors, the court commented that "the very ordinariness of such factors

strongly suggests that something more must change before an affiliation raises a question concerning representation." *Id.*[3] In fact, the Third Circuit analysis does focus on something more: the documented shifts in power and control that occur when, for example, a former independent gives an international the right to approve strikes. *See Sun Oil*, 576 F.2d at 557. The "increased size" by virtue of the affiliation and the resulting "financial support," while not conclusive, bear on that issue because the provision of benefits can reflect the flip side of the exertion of control. Realistically appraised, then, the Third Circuit cases do not turn on the "ordinary" factors cited by the Ninth Circuit. Rather, they depend upon an analysis of the relationship between an International and its local that conflicts sharply with the tack taken by other courts.

C. The Third Circuit's approach charts a course consistent with this Court's directives in *FIEA*, in contrast to the Board's mechanical test, which inevitably (and empirically) results in finding continuity after affiliations. This Court in 1986 acknowledged that continuity would not survive "[i]f the organizational changes accompanying affiliation [are] substantial enough to create a different entity." 475 U.S. at 200 (App. 42a-43a). The Court's opinion showed that it understood continuity to require a factual inquiry that could not be resolved summarily or by *per se* rules. *See Garlock Equipment Co. v. NLRB*, 709 F.2d 722, 723 (D.C. Cir. 1983) (*per curiam*) (remanding because of Board's failure to articulate factual basis for continuity decision). More to the point, the Court's decision appeared to assume that "administrative or organizational changes" accompanying affiliation sometimes could result in a new and different union. *FIEA*, 475 U.S. at 206 (App. 50a). Indeed, the Board led the

[3] The First Circuit and Seventh Circuit have taken the same approach to the Third Circuit cases. *Insulfab Plastics*, 789 F.2d at 967; *May Department Stores*, 1990 U.S. App. LEXIS 2964, at 22, n.9.

Court to that conclusion, arguing that Local 1182 was itself new and different from the Independent. *See FIEA*, 475 U.S. at 200, n.7 (App. 42a).

In fact, contrary to the clear implication of *FIEA*, and in contrast to the Third Circuit rule, the Board's continuity criteria create a *per se* test when applied to union affiliations: they are designed to show continuity in every affiliation case, and they have in fact done so.[4] So far as Seafirst can determine, the Board has never declined to recognize a continuing bargaining relationship following affiliation (as opposed to merger), absent an intra-union schism, *e.g.*, *Missouri Beef Packers, Inc.*, 175 N.L.R.B. 1100 (1969), or a simultaneous merger of the old independent into an existing local of the international, *e.g.*, *Garlock Equipment Co.*, 288 N.L.R.B. No. 31 (Mar. 25, 1988). Acknowledging this trend, the court below noted its temptation "to find a guiding principle to the effect that if an independent becomes a self-contained local by affiliation with an international, continuity is preserved." 892 F.2d at 799 (App. 14a). In light of the well-established rejection of *per se* rules in this field, however, the court below concluded that "to ask only whether the old independent has become its own local oversimplifies the analysis." *Id.*

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[4] The Board has recently described the relevant factors as follows:

> Factors mentioned in decisions dealing with the question of continuity of representation have included the following: continued leadership responsibilities by the existing union officials; the perpetuation of membership rights and duties, such as eligibility for membership, qualification to hold office, oversight of executive council activity, the dues/fees structure, authority to change provisions in the governing documents, the frequency of membership meetings, the continuation of the manner in which contract negotiations, administration and grievance processing are effectuated; and the preservation of the certified union's physical facilities, books and assets.

Western Commercial Transport, 288 N.L.R.B. No. 27 (March 25, 1988), *slip op.* at 11 (footnote omitted).

Closely examined, however, the Board's criteria ask only that question and nothing more. In other words, the criteria foreordain the result in any case involving an "old independent" that becomes "its own local," as occurred here. In the words of the court below, this "oversimplifies the analysis," in large measure because it fails to heed this Court's directive to examine "organizational" as well as "administrative" changes occurring upon affiliation. *See* 475 U.S. at 206 (App. 50a). As the following review discloses, the criteria applied below concentrate on apparent continuity in easily manipulated and superficial administrative details, while ignoring the profound organizational transformations that are the focus of the Third Circuit's inquiry. Each of the criteria applied below,[5] *see* 892 F.2d at 799 (App. 15a), will be considered in turn:

1. "*Whether the members and leaders of the union continue to exercise a similar degree of participation and control in decisions such as approving contracts and strikes.*" This criterion exists to determine if autonomy persists after affiliation. The Ninth Circuit's treatment of this factor establishes that every affiliation will pass muster. Here, the RCIU Constitution gave the International authority to veto contracts, to refuse strike authorization, and to order cessation of work. Const. §§ 8(B), 32(D)(2), 32(D)(7) (App. 70a). Disregarding the words of the constitution, the court below found continuity based on the self-serving testimony of a union official "that local control remained essentially intact" and that the RCIU would exercise its right to impose trusteeships in only narrowly circumscribed cases. 892 F.2d at 799 (App. 16-17a).[6] One cannot imagine the affiliation that will fail

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[5] The court below recast the Board's criteria slightly. Although it appears that this recharacterization was designed to make the Board's position more defensible, Seafirst will analyze the criteria as the Ninth Circuit presented them.

[6] The court below quoted the International official to the effect that only four trusteeships had been imposed in recent memory, "three for financial misdeeds and one by request from a local union

this test. *See May Dept. Stores*, 1990 U.S. App. LEXIS 2964 at 23 (resolving same issue). International unions do not clumsily intervene to enforce policies, and even the most ill-advised union will testify that autonomy remains "intact."

This issue of autonomy and control points up the telling difference between the Third Circuit and the Board, a difference that an example illuminates most effectively. In 1972, the Board amended its certification to reflect an affiliation with the Steelworkers of a former independent union representing miners at Bunker Hill Company. *Bunker Hill Co.*, 208 N.L.R.B. 27, 29 n.5 (1973). The mines then fell on troubled times, and the workers in 1981 ratified a wage cut that would have permitted Bunker Hill to continue operating. Like the RCIU constitution, however, the Steelworkers constitution reserved to the International a veto power over contracts. Using that power, the International vetoed the plan, the company shut down, and 2100 workers lost jobs. Raskin, "The Cooperative Economy," *The New York Times* (Feb. 14, 1982), sec. 3, p. 1, col. 3, at p. 20, col. 4; *see also* "Statements before Senate Labor and Human Resources Subcommittee on Labor," *Daily Labor Report*, No. 182 (Sept. 19, 1984), p. D-1 (remarks of Idaho Senator Symms).

Only the most cynical would claim that the union that shut down the mines was the "same" as the previously certified independent. There plainly was a substantial change in the "certified union's relationship with the employees it represents," *FIEA*, 475 U.S. at 202 (App. 45a), evidenced when the international thwarted the

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torn by infighting." 892 F.2d at 800 (App. 17a). With respect to a trusteeship commenced in mid-1979, however, a United States District Court found that the UFCW imposed the trusteeship "in bad faith . . . in an attempt to oust the president" of the local. *UFCW v. Local 919*, 104 L.R.R.M. 2089, 2090 (Dist. Conn.) *aff'd mem.* 614 F.2d 1291 (2d Cir. 1979). *See also Hansen v. Guyette*, 814 F.2d 547, 551 (8th Cir. 1987) (describing UFCW limits on local strike rights and bargaining strategy).

local's plans. The Third Circuit's test, focusing on the 1972 shifts in control that flowered in 1981, would have disclosed discontinuity; the Board's test, on the other hand, would always find the kind of power reserved in the Steelworkers' constitution to be without persuasive effect. This kind of well-publicized international intervention, of course, happens periodically. *See* "The UAW Takes on Mack—and Its Own Members," *Business Week* (March 23, 1987) at 116H (describing UAW intervention to veto contract agreed upon by local union). And for every example of vetoed contracts, common sense suggests that there are thousands of examples of small shifts in policy guided by hints from above. The Board's test ignores these facts.

2. *"Whether the structure of the prior union's government remains substantially intact."* The Board has applied this criterion to determine if the same individuals continue as officers. In the context of affiliations, the Board's approach virtually guarantees a finding of continuity. As a practical matter, affiliations occur only when supported by union leadership. *See* G. Chaison, *When Unions Merge* (D.C. Heath and Co. 1986) at 71 ("If officers did not want the merger, it would never reach the membership for their consideration."). In the case of a true merger, the blending of leadership from more than one local may cause some officers to lose their positions, making this factor probative; in an affiliation, on the other hand, the old independent's officers can retain their jobs.[7] Thus, with respect to affiliations, as the Second

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[7] Given this fact, it is surprising that two of the Independent's three officers were no longer officers of Local 1182 by the time of the hearing five months after the affiliation. In the absence of any explanation for the turnover, and in disregard of the union's burden of proof, the court below ignored this fact because "there was no evidence that the turnover was a product of orders from the International or even subtle pressure." 892 F.2d at 801 (App. 18a). The court below further held that "[t]he functions of the constitutional officers remain the same after affiliation, although the titles

Circuit has noted in a comparable context, "Defection of officers and seizure of assets are by no means indications that the old organization is continued in the new." *Harbor Carriers of the Port of New York v. NLRB*, 306 F.2d 89, 94 (2d Cir. 1962), *cert. denied sub nom. Deck Scow Captains Local 335, Independent v. Harbor Carriers of the Port of New York*, 372 U.S. 917 (1963).

3. "*Whether funds remain under the control of similar officers.*" The court below found this criterion satisfied because both the Independent's and the Local's "assets were in a checking account, withdrawals from which were restricted to persons holding certain offices." 892 F.2d at 801 (App. 18a). This meaningless criterion will be satisfied in every case of affiliation.

4. "*Whether dues are collected in the same way.*" The court below found that "the constitutional provisions respecting membership dues changed." Nevertheless, it found continuity in dues structure because "the local has the right, after affiliation, to charge higher dues than the International," 892 F.2d at 801 (App. 19a), even though the International was required to approve *any* increase in dues. Const. § 30(A). Few new affiliates would fail to have this minimal level of authority, subject as it was to International approval. Again, as applied this criterion dictates a result.

5. "*Whether jurisdictional provisions remain the same.*" Local 1182 expanded the Independent's jurisdiction from Seafirst employees to financial institution employees throughout Washington, and Local 1182 shortly after affiliation began organizing efforts at other employers. Ex. E-5; *Ford Motor Credit Co.*, No. 19-RC-9042 (Sept. 7, 1978). The Board and the court below found no discontinuity, however, because the old Independent *could*

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have been changed." *Id.* This statement boils down to the proposition that continuity existed because union officers continued to act like union officers.

have altered its jurisdiction by "action of the executive committee and ratification by the employees." 892 F.2d at 801 (App 19a). In other words, even when jurisdiction *differs*, the Board can pay no attention so long as the independent has the authority to modify its jurisdictional provisions—as every union can. This factor, then, will never show discontinuity.

6. "*Whether the prior union's policy making body retains similar responsibilities.*" When an old Independent becomes a new local, this factor will always be satisfied. *See* 892 F.2d at 801 (App. 19a) (factor distinguishes case "from the cases where the independent, rather than becoming its own local, is swallowed up by another local.").

7. "*Whether leaders are elected from similar sized units of workers.*" Again, when an old independent becomes a new local, this factor will always be met. *Id.*

8. "*Whether grievances are handled in a similar manner.*" No evidence could be taken regarding grievances, as the grievance machinery expired with the Independent's contract in the fall of 1977. But again, assuming that evidence were available, it would always appear to show continuity when an old independent becomes a separate local: in those cases, the same personnel, probably with the same official designations, would inevitably administer the contract.

* * * *

In sum, the Board's criteria do not function as analytical tools, but as a ritual incantation that has long since ceased to have any relationship to the reality of affiliations. The Board's approach, approved by the court below, inquires only into administrative details, i.e., who runs the union, who signs the checks, how dues are collected, and so on. When a local union or an old independent *merges* into another union, the shakeout of adminisartive power may tell much of the merged union's new role. On the other hand, as the above analysis shows, basic

administrative structure will remain superficially intact when an independent *affiliates* and forms its own local. In affiliation cases, then, inquiry into administrative change reveals nothing of the extent of transformation. In these circumstances, the Board must examine, in the words of this Court, "the organizational changes accompanying affiliation" to determine if they are "substantial enough to create a different entity." *FIEA*, 475 U.S. at 200 (App. 42-43a).

An assessment of organizational changes must begin with identification of fundamental organizational characteristics. For most small, independent unions, those characteristics include employer-specific goals, full freedom and autonomy.[8] Because it has refused to acknowledge these traits, the Board has failed to focus on the most important factors in assessing post-affiliation continuity—transfers of power and authority. The Third Circuit test examines precisely those issues. The Court should thus grant the writ and hold that the *American Bridge* approach better suits the policies outlined in *FIEA*.

II. THE DECISION BELOW IMPROPERLY DECLINES TO CONSIDER EMPLOYEE SENTIMENT IN EXAMINING CONTINUITY, THUS PERPETUATING CONFUSION AS TO THE MEANING OF THE COURT'S PRIOR OPINION.

In its 1986 decision, this Court's comments regarding continuity focused on two discrete issues: (1) whether an affiliation has substantially changed a certified union, and (2) whether the newly-affiliated union enjoys majority support within the bargaining unit. The Court wrote:

> Of course, as is the case with any organizational and structural change, a new affiliation may *substantially*

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[8] To reflect these characteristics, the Independent here chose a name that embodied both the identity of its employer ("Firstbank") and its fundamental organizational character ("Independent Employees Association").

> *change a certified union's relationship with the employees it represents.* These changed circumstances may in turn raise a "question of representation," *if it is unclear whether a majority of employees continue to support the reorganized union. Thus, in these situations, the affiliation implicates the employees' right to select a bargaining representative,* and to protect the employees' interests, the situation may require that the Board exercise its authority to conduct a representation election. 29 U.S.C. § 159(c)(1).

475 U.S. at 202 (App. 45-46a) (emphasis added). For reasons discussed more fully below, Seafirst believes that this passage requires an examination of available evidence of employee sentiment in conjunction with the continuity inquiry. The Board and the court below disagreed and thereby, Seafirst believes, misinterpreted this Court's earlier decision. The Court should grant the writ to resolve this important issue.

In applying *FIEA*, one court has focused on its references to majority support. The Fourth Circuit has written that a post-*FIEA* continuity determination must be directed to proof "by objective considerations" that the newly affiliated or merged union "has lost majority support," an inquiry that necessarily involves the examination of facts disclosing the sentiment of *all* represented employees, not just union members. *National Posters Inc. v. NLRB*, 885 F.2d 175, 179 (4th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3397 (U.S. Dec. 11, 1989) (No. 89-914). Likewise keying on the concept of "majority support," one member of the Board has found evidence of discontinuity irrelevant when affiliation/merger election results demonstrate that the new entity "retains the majority support of the Employer's employees" *Western Commercial Transport*, 288 N.L.R.B. No. 27 (March 25, 1988), *slip op.* at 16; *Garlock Equipment Co.*, 288 N.L.R.B. No. 31 (March 25, 1988), *slip op.* at 8.

The majority of the Board, on the other hand, has treated the issue of employee sentiment (and the re-

lated question of good faith doubt as to majority support) as separate from continuity. Thus, the Board in this case held that it would find a question concerning representation if "the changes in the bargaining representative are sufficiently dramatic to alter its identity, or, in the traditional manner, 'by proof of [objective] considerations for good faith doubt.'" Slip op. at 4, n.10 (App. 27-28a). The Board has argued that this Court's 1986 decision requires such a segregation of the inquiries, on the ground that consideration of employee sentiment in conjunction with the exploration of continuity "would be tantamount to the Board's conducting an informal poll concerning the affiliation among those to whom, the Court held, no opportunity to vote need be extended." *Id.* The court below agreed. 892 F.2d at 801 (App. 20a).

Neither the Fourth nor the Ninth Circuit nor the Board has grasped the full import of this Court's comments concerning majority support. The continuity test exists to unearth post-affiliation changes that would alter a union's identity and thus call into question the representational desires of *all* affected employees. *See* 475 U.S. at 202 (App. 45a) ("a new affiliation may substantially change a certified union's relationship with the employees it represents"). Given that purpose, a continuity inquiry that denies any role to employee sentiment makes no sense. If the represented employees *believe* that an affiliation has substantially changed their relationship with the certified union, the Board should not be allowed to disregard that sentiment and conclude that changes are inconsequential.

In different contexts, the Board has recognized the logical inconsistency of arrogating to itself the job of making continuity decisions. For example, when a certified independent has affiliated with an international that the independent defeated in a recent Board election, the Board will not amend its certification. *See, e.g., United Hydraulics Corp.*, 205 N.L.R.B. 62 (1973); *Bunker*

Hill Co., 197 N.L.R.B. 334 (1972). In that situation, the Board defers to the unit sentiment expressed in the representation election. And in connection with that measure of sentiment, the Board has also considered the extent of internal opposition to affiliation as probative of employees' views. *Mosler Safe Co.*, 210 N.L.R.B. 934, 935 (1974).

In this case, no recent representation election provided a ready reference for employee sentiment. The record did show, however, that the bargaining unit had ousted an international affiliate in favor of the Independent in 1970, that membership had rejected another international affiliation in 1974, that nearly 40% of those voting cast ballots against affiliation (an issue that generally passes by wide majorities. *cf Mosler Safe*, 210 N.L.R.B. at 935), and that hundreds of employees had protested their exclusion from the vote. The Board would consider none of this evidence, specifically rejecting Seafirst's invitation to engage in "a general examination" of opposition to the affiliation. Slip op. at 4, n.10 (App. 27a). To this same litany, the court below responded only that "[t]he flaw in Seafirst's reasoning is that it assumes an employee's vote for affiliation is evidence of his or her feeling that the new union will be substantially the same as the old." 892 F.2d at 802 (App. 20a).

Common sense shows, and *Mosler Safe* implicitly recognizes, however, that this kind of turmoil and division does not accompany a mere change in the union's name:[9] the employees knew that a significant change was to occur

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[9] The Ninth Circuit stated that employees could have voted against the affiliation because they believed "that affiliation won't make enough difference in the way things are run." 892 F.2d at 802 (App. 20a). This comment ignores the ample materials in the record showing that the affiliation campaign focused on issues of autonomy and power: Seafirst warned against the loss of autonomy; the Union claimed that autonomy would be preserved and strength enhanced. *See* Exs. P-10, P-11(b), P-19, P-20.

upon affiliation. Given the indicia of employee sentiment, it would be absurd to approve this affiliation while rejecting mergers approved almost by acclamation. *See Western Commercial Transport*, 288 N.L.R.B. No. 27 (85 of 136 unit employees voted; 71 voted for, 13 against, and 1 ballot challenged); *Garlock Equipment Co.*, 288 N.L.R.B. No. 31 (vote of 59 to 3 in favor, in a unit of 71). In view of these circumstances, the Court should accept review to clarify the important role that employee sentiment plays in assessing continuity.

III. THE DECISION BELOW PLACES IMPROPER TEMPORAL LIMITS ON THE CONTINUITY INQUIRY.

Apart from the substance of the continuity inquiry, the question of its temporal limitations presents an important issue that this Court should resolve. Both the Board and the court below declined to allow Seafirst an evidentiary hearing to explore evidence of post-affiliation changes proffered in 1979. Nothing in *FIEA* suggests that an employer can be so limited in its efforts to prove that affiliation has caused a change. To the contrary, the Court's opinion speaks in terms of the possibility that "a new affiliation may substantially change a certified union's relationship with the employees it represents." *FIEA*, 475 U.S. at 202 (App. 45a). Especially if administrative details are to be the focus, only time will tell if circumstances have changed, and the Board consequently must accommodate the passage of time in its decision-making process.[10] Because this issue will arise

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[10] When an employer must present its case in a limited time frame, as occurred here, it essentially will be confined to discussing "the differences in the precise letter of the two constitutions," *see* 802 F.2d at 799 (App. 15a), as it will have no practice on which to base its argument. In that context, the Board's refusal to attach weight to constitutional differences places an impossible burden on the employer.

in every affiliation case, the Court should grant the writ to resolve this important federal question.

Seafirst began its efforts to secure consideration of post-affiliation changes in June of 1979, before it had been found guilty of any unfair labor practices. The Versoi Affidavit recited a number of "administrative" changes that had occurred since the affiliation fifteen months earlier. *See*, *supra*, at 5-6. In 1979, the Board rejected the evidence based on its then existing *per se* rule that because the affiliation was automatically an "internal union matter" the new evidence would not have made any difference, and the Bank necessarily did not raise "any issue which is properly litigable in this unfair labor practice proceeding." *Seattle-First National Bank*, 245 NLRB at 700 (App. 57a).

After this Court held that an employer *may* raise questions concerning structural and organizational changes, *FIEA*, 475 U.S. at 206 (App. 50a), the Board could no longer claim that Seafirst's affidavit was irrelevant. Nevertheless, the Board on remand afforded no opportunity for a hearing on events following July of 1978, but then complained of the absence of record evidence with respect to various items that the affidavit addressed.[11] The Bank thus moved for reconsideration to obtain a hearing to explore that evidence.

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[11] For example, the Board's decision noted the lack of evidence concerning the reasons for the turnover of officers and then postulated, without record support, that the turnover was "natural." Slip op. at 5 (App. 28a). Because of the absence of discovery in Board proceedings, however, the Bank was in no position to proffer evidence on the subject of turnover without a hearing. Similarly, the Board gave little weight to differences in handling the union's finances, the amendment process, membership meetings, and physical facilities because "[l]ittle record evidence exists regarding these matters." Slip op. at 9, n.12 (App. 32a). Finally, the Board concluded that "alleged changes in the physical facilities involved the relocation of the union's office from one room to another, just down the hall in the same building," despite the fact that the affidavit flatly contradicted this finding. *Id.*

At this point, the Board responded with yet another tack. Citing Board Rule 102.48(d)(1),[12] it rejected the request on the theory that reconsideration could be justified only by submission of evidence in existence at the time of the original hearing, but available only after that hearing through no fault of the moving party. Order Denying Motion, at 2, n.3 (App. 23a). In essence, then, the Board ruled that *no* events following the initial hearing could ever be explored. The Court below offered its own explanation for this ruling:

> The July, 1978 hearing offered ample opportunity to Seafirst to make its case on the issue of continuity. Seafirst made no effort to develop a record, through either its own or FIEA's witnesses, *on the future changes expected in the relationship among the International, the union, and its members.*

892 F.2d at 797 (App. 10a) (emphasis added).[13]

According to the Ninth Circuit, then, a party must "develop a record" based upon nonexistent facts, *i.e.*, possible "future changes." This is an impossible burden. The more sensible course is to permit the employer to bring changes to the Board's attention when and if they occur. Otherwise, unions will be encouraged to maintain a facade of continuity only until completion of the initial hearing. From that point forward, the Board now holds, newly affiliated unions have a free shot at

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[12] This rule provides that reconsideration will be granted to consider "newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing . . ." 29 CFR § 102.48(d)(1). The Board's odd construction of this rule here finds support in one poorly reasoned Ninth Circuit decision. *NLRB v. Cutter Dodge, Inc.*, 825 F.2d 1375, 1381 (9th Cir. 1987). It is, however, at odds with past Board practice.

[13] The court below became so enthusiastic on this issue that it denied Seafirst's motion to add the Versoi Affidavit to the record. In fact, no such motion was ever filed, as the Versoi Affidavit was already in the record.

whatever changes they can make until entry of a final order. Here, Local 1182 has used that hiatus to accomplish major administrative changes in 1979, as well as to effect a major merger in 1988—all of which the Board has forever insulated from scrutiny, simply because they occurred after the 1978 hearing. This temporal limitation is at odds with the fact finding contemplated by *FIEA*.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

DATED this 20th day of March, 1990.

Respectfully submitted,

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March 20, 1990

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-7416
D.C. No. 19-CA-11364

SEATTLE-FIRST NATIONAL BANK,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 88-7547
D.C. No. 19-CA-11364

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

SEATTLE-FIRST NATIONAL BANK,
Respondent.

Petition from National Labor Relations Board
Cross-Petition for Enforcement

Argued and Submitted
October 31, 1989—Seattle, Washington

Filed December 20, 1989
Amended January 26, 1990

Before: James R. Browning, Mary M. Schroeder and Betty B. Fletcher, Circuit Judges
Opinion by Judge Fletcher

ORDER AND AMENDED OPINION

COUNSEL

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Linda Dreeben, Supervisory Attorney, National Labor Relations Board, Washington, D.C., for the respondent/petitioner.

Edward P. Wendel, Assistant General Counsel, United Food & Commercial Workers International Union, Washington, D.C., for the intervenor.

ORDER

The opinion filed December 20, 1989 is amended as follows:

On page 14556 of the slip opinion, the sentence "*Western Commercial Transport*, 288 N.L.R.B. No. 27, 1987-1988 NLRB Dec. (CCH) ¶ 19,309 (1988), decided by the Board shortly after the Supreme Court's *FIEA* decision, suggests the content of that 'something more'" should mark the beginning of a new paragraph and should thus be indented.

On page 14559 replace the sentence "We do not find this to be error" with "We do not find error in the Board's view that the practices were controlling."

On page 14561 insert before the sentence beginning "The difference is not crucial" the following sentence:

"Under the previous constitution, the employees' rejection of the contract was final."

On page 14562 in the first paragraph replace the word "Moreover" with "However."

On page 14562 in the first sentence of the third paragraph, delete the word "the" that appears between "that" and "FIEA's."

OPINION

FLETCHER, Circuit Judge:

I

Seattle-First National Bank ("SeaFirst") petitions from a National Labor Relations Board ("NLRB" or "Board") decision finding it in violation of the National Labor Relations Act and ordering it to bargain. The Board cross-petitions for enforcement of its order. We deny SeaFirst's petition and enforce the Board's order to bargain.

II

BACKGROUND FACTS AND PRIOR PROCEEDINGS

In 1970 SeaFirst's employees chose the FirstBank Independent Employees Association ("the Independent") as their bargaining representative in a Board-conducted election. The Board certified the Independent; the Bank and the Independent entered into a collective bargaining agreement in 1971, which lasted until October, 1977. By the end of 1977, negotiations for a new contract were proving long and difficult, and the executive council of the Independent considered affiliation with an international union to strengthen its bargaining position.

In January, 1978, the Independent's executive council notified employees that it would submit to union members for a vote a proposal to affiliate with the Retail Clerks International Union ("the International"). The bargaining unit consisted of over 4700 employees, of

whom approximately 55% were members of the Independent. Nonmembers were not permitted to vote. The election took place in February, and a little more than 60% of the members who voted approved the affiliation.

On April 1, 1978 the Independent received a charter from the International and became the Financial Institution Employees of America, Local 1182, chartered by Retail Clerks International Union, AFL-CIO ("FIEA"). On June 19, FIEA petitioned the Board to amend its certification to reflect its new name. SeaFirst notified the Board that it opposed the certification because the election violated due process by excluding nonmembers and because the affiliation broke the continuity of representation required.

The Board's Region 19 conducted a two-day hearing in July of 1978 to consider the fairness of the affiliation election and the extent to which the affiliation disturbed the continuity of representation. This was the only proceeding in which evidence was taken; in practically every proceeding since, SeaFirst has attempted to introduce new evidence.

On April 5, 1979, the Board granted the amendment to the union's certification. *Seattle-First Nat'l Bank*, 241 N.L.R.B. 751.

SeaFirst nonetheless refused to recognize and bargain with FIEA. The case went to the Board again, this time for a determination of whether SeaFirst, in refusing to bargain, was in violation of sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), 158(a)(5). In September of 1979, the Board, resting on its prior findings in the certification case, concluded in a summary judgment proceeding that SeaFirst was in violation of the Act and ordered it to bargain. 245 N.L.R.B. 700. The Board rejected SeaFirst's request to reopen the hearing and to take evidence related to allegations made in the affidavit of James A. Versoi, Manager

of Labor Relations at SeaFirst. The affidavit alleged among other things that there was a 100% turnover of union officers, that the new union was attempting to organize other employers' workers, and that many employees were leaving the union because they thought that the affiliation election was not fair and right.

SeaFirst petitioned this court to review the Board's bargaining order. While review was pending, the Board requested leave to reconsider its decision in light of the Fifth Circuit's opinion in *Amoco Prod. Co. v. NLRB*, 613 F.2d 107 (5th Cir. 1980). The petition to this court was withdrawn. The *Amoco* case held that nonunion members must be allowed to participate in an affiliation election in order for a union to maintain its status as a certified representative. The Board decided to follow the Fifth Circuit opinion, vacated its previous decision in favor of the union, and issued a new decision in which it addressed only the election issue and not the continuity issue.

FIEA petitioned this court for review. We reversed the Board's decision. *NLRB v. Financial Institution Employees, Local 1182*, 752 F.2d 356 (9th Cir. 1984). The Supreme Court granted certiorari and affirmed the Ninth Circuit in a unanimous opinion. *Financial Institution Employees, Local 1182 v. NLRB*, 475 U.S. 192 (1986). Both the Ninth Circuit and the Supreme Court decided only the election issue, because that was the only issue the Board addressed after it had vacated its initial decision. We remanded the case to the Board in 1986 for a determination of the continuity issue.

On July 29, 1988, on the basis of the July, 1978 hearing the Board decided the continuity issue in favor of FIEA and found SeaFirst in violation of §§ 8(a)(1) and 8(a)(5) of the Act. 290 N.L.R.B. No. 72 (slip op.). We now review that decision. In addition, SeaFirst has filed a motion with this court to supplement the record so that the court can consider whether FIEA's 1988 merger with

another local of the United Food and Commercial Workers International [1] raises a question of representation.

III

DISCUSSION

A. Supplementing the Record.

Before we consider the merits of the Board's decision, there are two preliminary matters we must consider, both of which concern the scope of the record under review.

1. The 1988 Merger

SeaFirst asks this court to consider, or alternatively, to remand to the Board to consider, continuity of representation in light of FIEA's 1988 merger with another local. It submits materials setting forth the terms of the merger and the UFCW International constitution. In light of the merger, SeaFirst contends the Board's bargaining order is inappropriate even if the court affirms the Board's finding of § 8(a)(1) and § 8(a)(5) violations.

SeaFirst offers several theories that would enable this court to take cognizance of the new information and rule on the "new" continuity issue. Its first theory is that the papers are judicially noticeable because they were filed with a public agency. The second is that Rule 10(e)[2] of the Federal Rules of Appellate Procedure, and the inherent equitable powers of courts generally, allow this court in its discretion to expand the record on appeal. The third is that the United States Supreme Court held in *NLRB v. Jones & Laughlin Steel Corp.*, 331 U.S. 416 (1947), that courts reviewing bargaining orders may take cognizance

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[1] The Retail Clerks International Union merged with another union in 1979 to become the UFCW. The Board amended the certification of the RCIU; the propriety of that decision is not questioned.

[2] If any Rule would govern it would be Rule 16(b), not 10(e). Rule 10 applies only to records made in the district court.

of evidence unobtainable at the time the case was before the Board and may either rule on the case in light of the new evidence or remand the case to the Board for further consideration.

Only the third of these theories merits any discussion. The first two, though flawed for a number of reasons independent of *stare decisis*, run headlong into a wall of Ninth Circuit cases that prohibit our consideration of the supplemental evidence. *See L'Eggs Prods., Inc. v. NLRB*, 619 F.2d 1337 (9th Cir. 1980); *NLRB v. Coca-Cola Bottling Co.*, 472 F.2d 140 (9th Cir. 1972); *NLRB v. L. B. Foster Co.*, 418 F.2d 1 (9th Cir. 1969). In *L'Eggs* the court held that in enforcement cases it will neither consider on its own, nor remand to the Board for the Board's consideration, evidence demonstrating that because of the passage of time, the union may not be as representative of the employees in the relevant units as it was when the employer first refused to bargain. 619 F.2d at 1353. The court in *L'Eggs* noted that a contrary practice would put a premium on continued litigation by the employer. *Id.* As support for its decision the court cited *Franks Bros. Co. v. NLRB*, 321 U.S. 702 (1944), which held that the fact that a union has lost its majority status at the time a bargaining order is issued does not preclude enforcement of the order. The very specific policy of deterring protracted litigation advanced by *Foster* and *L'Eggs* necessarily trumps the vague equitable concerns that SeaFirst cites as reasons for this court to take judicial notice of the evidence or to take extraordinary action under its "inherent authority."

The third theory, relying on *Jones & Laughlin*, would permit reviewing courts either to consider the new evidence themselves or to remand to the Board.

In *Jones & Laughlin*, the employer refused to negotiate with a unit of plant guards because the guards had been sworn in as auxiliary police of the United States Army during World War II, a fact which, in the view of the

employer, made it particularly inappropriate to allow them to unionize. The Board disagreed and ordered bargaining. The Sixth Circuit refused to enforce the Board's order. The Supreme Court granted certiorari, vacated the Sixth Circuit's opinion on the grounds that militarization of guards did not preclude their unionization, and asked the circuit court to consider the employer's other arguments against enforcing the Board order. By the time the Sixth Circuit reconsidered the case, the guards had been demilitarized but they had been sworn in by the city of Cleveland as deputy police officers. The Sixth Circuit considered this factor—even though it was not before the Board—and again refused to enforce the Board's order, this time on the grounds that deputization was inconsistent with unionization.

The Supreme Court granted certiorari again, and even though it ruled for the Board on the merits, it rejected the Board's argument that because the deputization issue had never been presented to the Board, it was improper for the Sixth Circuit to have considered it:

> When circumstances do arise after the Board's order has been issued which may affect the propriety of enforcement of the order, the reviewing court has discretion to decide the matter itself or to remand it to the Board for further consideration. For example, where the order obviously has become moot, the court can deny enforcement without further ado; but where the matter is one involving complicated or disputed facts or questions of statutory policy, a remand to the Board is ordinarily in order.

331 U.S. at 428. The Supreme Court found its position to be consistent with § 10(e) of the NLRA, 29 U.S.C. § 160(e):

> [T]he provision of § 10(e), that "No objection that has not been urged before Board, its member, agent or agency, shall be considered by the court, unless the

failure or neglect to urge such objection shall be excused because of extraordinary circumstances," quite obviously refers to objections that might have been but were not raised in the original proceedings before the Board.

An objection to an order to bargain based on the union's alleged loss of majority support in the period after the time of the Board's order might, on a superficial reading of *Jones & Laughlin*, seem to be the type of objection outside § 10(e)'s limitation that an appeals court should consider in an enforcement proceeding. But a long line of cases, from *Franks Bros.* to *L'Eggs*, stands for the proposition that the purpose of an order to bargain is not simply to effectuate majority rule in a particular case but also to deter wrongful refusals by employers to recognize majorities promptly. Nothing in *Jones & Laughlin* dictates a departure from that policy.

In *Jones & Laughlin*, the employer was not asserting that changed circumstances raised a question of representation or of the union's majority status; it was raising a broader objection to bargaining—namely that the status of unit employees as police officers was inconsistent with the policies of the Act. In the class of cases in which the passage of time is not inherently likely to make the employer's basis for objection to bargaining appear more and more "reasonable," the reasons for a court to refuse pleas of changed circumstances are less compelling than where delay feeds upon itself and makes unreasonable positions seem continually more "reasonable." With each passing year any union's constitution, in both senses of the word, is likely to change. When lack of a union majority, or as in this case, lack of continuity, is the asserted basis for a refusal to bargain, delay becomes the basis of an argument that there ought to be more delay. To paraphrase what this court said in *Foster*, "When will it stop?" We stop it here. We decline to expand the record before this court or to remand.

2. The 1979 Versoi Affidavit

SeaFirst has repeatedly asked the Board to hold a new hearing in light of "new evidence" presented in the June 29, 1979 affidavit of its Manager of Labor Relations, James A. Versoi.

The Board refused to grant a new hearing, citing its rule that newly discovered evidence is only grounds for a new hearing if the evidence was in existence at the time of the original hearing and the party excusably failed to adduce it. 29 CFR § 102.48(d)(1). In *NLRB v. Cutter Dodge, Inc.*, 825 F.2d 1375, 1381 (9th Cir. 1987), this court explicitly stated that the application of this rule to deny a new hearing was not an abuse of the Board's discretion. There is thus no merit in SeaFirst's contention that the Board was required to consider the Versoi affidavit.

SeaFirst argues that setting a hearing four months after an affiliation does not allow the challenging party enough time to prove that changes have occured, since a "devious" International could present a facade for that long. There are two problems with this argument. First, it proves too much; a devious union might be able to put up a front for even longer. How long is the Board to wait? The hearing on the amendment to certification was the most expeditious and efficient proceeding in the twelve-year saga of this litigation. We hesitate to fault the Board for expedition. Second, even if the "facade" argument might have merit in some cases, this is not such a case. The July, 1978 hearing offered ample opportunity to SeaFirst to make its case on the issue of continuity. SeaFirst made no effort to develop a record, through either its own or FIEA's witnesses, on the future changes expected in the relationship among the International, the union, and its members. The hearing officer put no obstacles in the way of SeaFirst's lawyer. Any paucity in the record inheres in the facts themselves, or in SeaFirst's failure to elicit them.

SeaFirst's motion to supplement the record to include the Versoi affidavit is denied. The Board did not err in deciding the case on the record made at the 1978 hearing.

B. Continuity

Under 29 CFR §§ 101.17 and 102.60(a), a certified union that has elected to affiliate with another union may petition the Board for an amendment to its certification to reflect its new name. The Board holds a hearing and grants the amended certification unless a "question of representation" exists. A "question of representation" is defined as sufficient doubt about the union's continuing status as the legitimate representative of employees in a particular unit that a new election should be conducted to determine employee sentiment. *See* National Labor Relations Act § 9(c), 29 U.S.C. § 159(c). If a "question of representations" exists, the Board refuses to amend the union's certification, and, pending a new election, the employer is relieved of the duty to bargain. *See FIEA*, 475 U.S. 192 (1986).[3]

Whether a question of representation exists is a question of fact. We defer to the Board if there is substantial evidence in the record as a whole supporting the Board's finding. *Retail Store Employees Union, Local 428 v. NLRB*, 528 F.2d 1225, 1227 (9th Cir. 1975). We also defer to the Board's substantial expertise in interpreting and applying the National Labor Relations Act, unless its interpretation is inconsistent with the policies of the Act. *Mesa Verde Constr. Co. v. Northern California in Dist. Council of Laborers*, 861 F.2d 112, 1130 (9th Cir. 1988) (en banc).

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[3] The Board's practice is to grant an amendment to certification after an election to affiliate if the election is conducted in accordance with due process and if the affiliation does not cause changes sufficiently dramatic to break the continuity of representation provided by the old union. *See Western Commercial Transport*, 288 N.L.R.B. No. 27, 1987-88 NLRB Dec. (CCH) ¶ 19,309 (Mar. 25, 1988). Only the continuity issue concerns us here.

The Supreme Court's decision in its earlier review in this case informs our current review of the Board's decision. The Court discussed in some detail the contours of continuity in affiliations in the course of deciding the issue of whether unions must allow nonmembers to participate in affiliation elections. *See NLRB v. FIEA*, 475 U.S. at 199-200. The Court noted the several purposes of affiliation, strongly suggesting that certain changes inhere in affiliation and should not be accorded significant weight in deciding the question of continuity.

The Court noted that a local union may seek to affiliate with a larger organization for a variety of reasons, such as to obtain "bargaining expertise or financial support or [to] compensate for a lack of leadership within the local union." 475 U.S. at 199 n.5. It quoted approvingly from a decision of the NLRB that a union "must remain largely unfettered in its organizational quest for financial stability and aid in the negotiation process," *id.*, and from the Board's brief that the "Board has in general found that affiliations do not destroy continuity of representation." *Id.* at 203 n.10.

These comments were essentially consistent with the approach taken by the Board over the years in deciding continuity questions. A new label to identify a change that would defeat continuity, "sufficiently dramatic," emerged, *id.* at 206, but it was just that—a new label. The Court's discussion of continuity constituted a blessing of the Board's basic approach.

In contrast, the Court's statements cast doubt on the continuing validity of the Third Circuit's jurisprudence in this area, on which SeaFirst heavily relies. In *Sun Oil Co. v. NLRB*, 576 F.2d 553, 556 (3rd Cir. 1978), the Third Circuit, quoting from a previous decision in which it found an affiliation to raise a question of representation, *American Bridge Div., U.S. Steel Corp. v. NLRB*, 457 F.2d 660, 664 (3rd Cir. 1972), stated, "The very act of affiliation here is a committment to change in the fulcrum

of union control and representation." Citing another of its decisions, *NLRB v. Gloekler N.E. Co.*, 540 F.2d 197 (3rd Cir. 1976), the *Sun Oil* court also held that an increase in economic power wrought by affiliation is of "particular significance" to the continuity question. *Sun Oil*, 576 F.2d at 557. The court also found the size of the international union, 200,000 members, to be significant. *Id.* These factors shrink in significance if one takes seriously the Supreme Court's view that increased size, financial support, and bargaining power are the very reasons why independent unions join internationals. The very ordinariness of such factors strongly suggests that something more must change before an affiliation raises a question concerning representation.

Western Commercial Transport, 288 N.L.R.B. No. 27, 1987-88 NLRB Dec. (CCH) ¶ 19,309 (1988), decided by the Board shortly after the Supreme Court's *FIEA* decision, suggests the content of that "something more." In that case, a small, independent union of 45 members had governed itself according to the following rules: officers were nominated by petition of 25 members and were elected by majority vote; proposals to amend the constitution and bylaws had to be made by 25 members, and they could be enacted with a majority vote; executive council policy decisions were subject to referendum; and an executive committee chosen from among the executive board was to represent the Union in contract negotiations. This intimate collective, strapped for funds, joined a District Lodge of the International Association of Machinists.

Upon affiliating with the IAM, the independent did not become a self-contained local of the IAM. Rather, it became part of a district lodge of 8500 members. The smallest subdivisions within that lodge were locals of approximately 500 members. No group of fewer than 500 members could choose its own delegate. There were 136 employees in the bargaining unit that the old independent union represented, so the members of the old unit were

effectively voiceless in the new organization. Even the one delegate that the local of 500 could pick was not a true representative. Rather, he or she merely was one of 17 people who voted for full-time, professional agents to manage day-to-day representation matters. The old union's officers had to give up their positions. Day-to-day contract administration was in the hands of staff members with no ties to the independent's bargaining unit. On these facts, the Board found that continuity did not exist.[4]

NLRB v. Insulfab Plastics, Inc., 789 F.2d 961 (1st Cir. 1986), is illustrative of cases where the Board did *not* find the "something more." The First Circuit affirmed the Board's finding of continuity, holding that an affiliation of a small independent union with a large international fulfilled the requirement of continuity even though the independent became subject to the international's constitution. That constitution established minimum dues and placed limits on the union's constitution. The court in *Insulfab* noted that the union continued to retain control over negotiating and administering contracts, processing grievances, and calling strikes. 789 F.2d at 966-67.

It is tempting to find a guiding principle to the effect that if an independent becomes a self-contained local by affiliation with an international, continuity is preserved, but if an independent merges into a pre-existing local of an international, continuity is defeated. *Compare Insulfab with Retail Store Employees*, 528 F.2d 1225 (9th Cir. 1975).

But to ask only whether the old independent has become its own local oversimplifies the analysis. The Board considers several factors that bear on the question of con-

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[4] Because we hold that there is substantial evidence to support the Board's finding of continuity, we need not address the additional issue faced by the Board in *Western Commercial* whether, absent continuity, a petition to amend certification should still be granted when a majority of employees in a unit vote to affiliate.

tinuity. The ultimate question is whether the union after affiliation operates in substantially the same way as it did before affiliation. The Board's expertise in the day-to-day functioning of labor organizations particularly suits it to determine the factors that bear on this question and the weight to be accorded them in particular cases. In this case the Board considered several factors: (1) whether the members and leaders of the union continue to exercise a similar degree of participation and control in decisions such as approving contracts and strikes, (2) whether the structure of the prior union's government remains substantially intact, (3) whether funds remain under the control of similar officers, (4) whether dues are collected in the same way, (5) whether jurisdictional provisions remain the same, (6) whether the prior union's policy-making body retains similar responsibilities, (7) whether leaders are elected from similar-sized units of workers, and (8) whether grievances are handled in a similar manner. The Board's determination that these factors are relevant is consistent with the policy of § 9 of the National Labor Relations Act to promote stability in collective bargaining relationships. *See FIEA*, 475 U.S. at 208-09. We therefore defer to the Board's determination.

The task remains for us to decide whether the conclusion the Board reached after applying those factors is supported by substantial evidence in the record. Understandably, the parties stress those facts and approaches to the evidence that advance their arguments.

SeaFirst argues that the inquiry should focus on the differences in the precise letter of the two constitutions, the Independent's and the International's. The union, by contrast, argues that the focus should be on how the union has functioned in practice under each constitution. The Board agreed with the union that the controlling considerations were the practices under the constitution; it credited the testimony of Mr. Donald J. Hofer, International Vice-President and Director of the Northwest

Division of the Union, who explained how the International constitution had operated in practice during his twenty years' experience working with the document and concluded that local control remained essentially intact. We do not find error in the Board's view that the practices were controlling.

Against this backdrop, we consider the Board's application of the factors it found relevant. With regard to the first factor, the processes for approving strikes and contracts, several provisions of the International constitution that potentially reallocate power are pertinent. Section 8(B) of the constitution reads:

> The International Executive Board shall have power to authorize strikes . . . when necessary to defend the organization in any locality against attacks of employers, combinations [or] lockouts[;] to support such actions by levying a per capita tax assessment *and by ordering a cessation of work for any employer involved, irrespective of where such work is located.*

The underscored clause is particularly controversial, because the International's power to *order* a strike would seem to present a considerable change in the relationship between unit employees and their bargaining representative. Under the union's pre-affiliation constitution, 60% of the members and two-thirds of the executive committee had to vote in favor of a strike before it could be ordered. But the record before the Board did not include just a bare document. Mr. Hofer testified about the clause:

> [I]n the twenty years that I've been an employee or an elected official of the union, I've never seen it used, and I've served on the International executive board for three years . . . [W]e can't—the International executive board can't—we can authorize a strike but we sure can't call one. The local union has to vote to strike.

On the issue of whether the International could prevent a local from striking when the local voted to do so, the language is ambiguous. Hofer testified that the practice had been that a local could strike without authorization, and the only sanction would be that it would not receive strike benefits from the International. Since the Independent did not provide strike benefits, the pro cedure for approval of strikes before and after affiliation is quite similiar. Before affiliation, the Independent could strike after a two-thirds' vote of its executive council and a three-fifths' vote of the affected employees. Under the International constitution, a majority vote of the local executive council and a two-thirds' vote of the affected employees allows the local to strike.

Section 9(K) of the International's constitution, which gives the International power to place a local in trusteeship, effectively depriving it of all autonomy, came under particular scrutiny. Mr. Hofer testified that the power was not a significant threat to the great majority of locals, that in the five years prior to the hearing, trusteeships had been imposed on four out of a total of 215 locals—three for financial misdeeds and one by request from a local union torn by in-fighting.[5]

Section 32(D)(2) of the International constitution provides that if the President of the International so requests, a membership-approved collective bargaining agreement must be submitted to him for approval before it is finally ratified. However, Hofer testified that in his experience the clause had never been used and that the members of locals for all intents and purposes had the last word on the terms of collective bargaining agreements.

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[5] In its brief SeaFirst cites several news accounts and judicial findings of exercises of the International's power in order to show that, contrary to Hofer's testimony, the International's power is not merely theoretical. The examples all are from the 1980's. For reasons stated in section III.A. of this opinion, we do not consider this evidence.

Section 32(D)(7) of the International constitution sets out contract and strike procedures different from the old procedures. It provides that in the event the employees both reject the employer's final offer and refuse to strike, the executive committee of the local can make a decision whether or not to accept the contract. Under the previous constitution, the employees' rejection of the contract was final. The difference is not crucial, however, because power remains vested entirely in local committees. The International has no say in the matter.

The controversy over the second factor, the continuity of officers, centers on a factual dispute. Immediately after FIEA received its charter from the International, the officers were the same persons. In the period between the time of the charter and the time of the hearing, April 1 to July 26, two of the three constitutional officers (President, Treasurer, and Secretary) quit, but there was no evidence that the turnover was a product of orders from the International or even subtle pressure. *Cf. Western Commercial Transport* (incumbent officers were not permitted to retain their positions). The resigning officers were replaced in accordance with the rules established by the Independent before affiliation. The functions of the constitutional officers remain the same after affiliation, although the titles have been changed to President, Secretary-Treasurer, and Recorder. The Secretary-Treasurer has the same responsibilities as the old Treasurer, and the Recorder's job corresponds to the old Secretary's. Under these circumstances, the change in officers is not inconsistent with the Board's finding of continuity.

Prior to the affiliation, the union's assets were in a checking account, withdrawals from which were restricted to persons holding certain offices. The same restrictions have applied since affiliation, and no International officer has any access to FIEA's funds. Thus evidence bearing on the third factor also supports the finding of continuity. *See Insulfab.*

After affiliation, the constitutional provisions respecting membership dues changed. The International required locals to charge at least six dollars per month, while the Independent had charged four dollars. The effect of the change was mitigated by the International's agreeing to waive the increase for at least one year. More importantly the local has the right, after affiliation, to charge higher dues than the International. The International constitution does give the International the power to levy a tax on the local, and the local, not the individual members, pays the tax. However, the international union often agrees to "subsidize" the local by waiving the tax, which it promised to do in this case, at least until FIEA became financially stronger. We note that there is at least as much autonomy reserved to the local to determine dues in this case as there was in *Insulfab*.

With regard to the fifth factor, jurisdiction, the Independent's constitution expressed some ambivalence. It cited employment at SeaFirst as a membership qualification, but also specifically mentioned that action of the executive council and ratification by the employees of amendments to the constitution could alter that requirement. The Independent's president testified that the reason the union never sought to organize other employers was lack of resources, not lack of support among members for such activities.

With regard to the three remaining factors, there was substantial evidence that FIEA's executive council was an analog of the Independent's executive council, exercised the same functions, and had similar powers. It was also clear that leaders were to be elected from the same unit as before the affiliation. The previous two factors distinguish this case from *Western Commercial* and from the cases where the independent, rather than becoming its own local, is swallowed up by another local. *Cf. Retail Store Employees*. Finally, there was evidence that grievances and other day-to-day affairs after affilia-

tion were handled according to procedures similar to those used before affiliation.

In sum, although the affiliation brought changes, there is substantial evidence in the record as a whole to support the Board's determination that the new union retained enough of its old character to render those changes insufficiently dramatic to warrant a finding that there could be a question of representation. We accord substantial deference both to the Board's choice of relevant factors and to the weights the Board assigns those factors. In this case there is no reason to upset the Board's calculus.

We reject SeaFirst's last argument that the Board should have considered evidence regarding employee support for affiliation as a factor in determining continuity. Specifically, the bank argues that the fact that "only" 61% of union members voted in favor of the affiliation in this case is evidence of a lack of continuity. SeaFirst is essentially trying to fight the same battle that it lost in the Supreme Court. In *FIEA*, 475 U.S. at 206, the Court held that affiliation is an internal union affair so long as continuity is maintained. A one-vote margin is enough.[6]

The flaw in SeaFirst's reasoning is that it assumes an employee's vote for affiliation is evidence of his or her feeling that the new union will be substantially the same as the old. There is simply no basis for attributing that motive to a vote. A worker may vote for affiliation hoping that things will change radically or vote against affiliation believing that affiliation won't make enough difference in the ways things are run.

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[6] We do not imply that *absent* continuity, the expressed will of all employees, union and non-union, is irrelevant to whether there is a question of representation. See n.4, *supra*.

IV

CONCLUSION

The Supreme Court has stated that the central policy of the National Labor Relations Act is to promote industrial stability and that allowing employers to respond to ordinary affiliations by refusing to bargain with a duly elected union would undermine that policy. *See FIEA*, 475 U.S. at 208-09. The criteria that the Board applied in this case were fully consistent with the central policy of the Act. Substantial evidence in the record as a whole supports its findings that the criteria for continuity were met.

We DENY SeaFirst's petition and ENFORCE the Board's order.

APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 19—CA—11364

SEATTLE-FIRST NATIONAL BANK

and

FINANCIAL INSTITUTION EMPLOYEES OF AMERICA,
LOCAL 1182, CHARTERED BY UNITED FOOD AND
COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO

ORDER DENYING MOTION

On July 29, 1988, the National Labor Relations Board issued a Decision and Order in this proceeding.[1] The Board found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to recognize and bargain with Local 1182 after it affiliated with the Retail Clerks International Union, AFL-CIO, the Charging Party herein. On August 26, 1988, the Respondent filed a Motion for Reconsideration and supporting brief, alleging, inter alia, that the Board erred in not granting the Respondent's request for a supplemental hearing before issuing its decision in this proceeding. On August 31, 1988, the Charging Party filed an opposition to the Respondent's motion.

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[1] 290 NLRB No. 72.

That National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[2]

The Board having duly considered the matter:

IT IS ORDERED that the Respondent's motion is denied as it contains nothing not previously considered and is lacking in merit.[3]

Dated, Washington, D.C., September 29, 1988.

JAMES M. STEPHENS, Chairman

MARY MILLER CRACRAFT, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

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[2] Member Johansen did not participate in the decision on the merits.

[3] Evidence that forms the basis for a well grounded motion for reconsideration must be newly discovered and previously unavailable to meet the requirements of Sec. 102.48(d)(1) of the Boards' Rules and Regulations. Newly discovered evidence must have been in existence at the time of the hearing, and have only become available after the hearing through no negligence of the moving party. *NLRB v. Cutter Dodge, Inc.*, 825 F.2d 1375, 1381 (9th Cir. 1987). The evidence that the Respondent seeks to introduce concerns events that took place subsequent to the hearing and could not have been in existence at a time relevant to the inquiry. Thus, the evidence is not newly discovered within the meaning of Sec. 102.48(d)(1). In any event, the affidavit on which the Respondent relies as a basis for its motion was considered by the Board prior to issuing the decision in this proceeding. It does not contain information that even if credited would require the Board to reach a different result. We therefore deny the Respondent's Motion.

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 19—CA—11364

SEATTLE-FIRST NATIONAL BANK

and

FINANCIAL INSTITUTION EMPLOYEES OF AMERICA,
LOCAL 1182, CHARTERED BY UNITED FOOD AND
COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO

DECISION AND ORDER

On November 30, 1970, the Firstbank Independent Employees Association (FirstBank) was certified by the Board as the exclusive bargaining representative of the employees of Seattle-First National Bank (SeaFirst and/or the Respondent) in the appropriate unit.[1] FirstBank later voted to affiliate with the Retail Clerks International Union, AFL-CIO (RCIU) and changed its name to Fincial Institution Employees of America, Local 1182 chartered by the Retail Clerks International Union (FIEA). FIEA petitioned the Board to amend its certification to reflect this change. The Board granted the petition and

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[1] The appropriate unit is:

All of the Employer's employees within the State of Washington, excluding professional employees, confidential employees, management trainees, and supervisors as defined in the Act.

amended the certification.[2] SeaFirst refused to bargain with FIEA, alleging that because nonunion members of the bargaining unit were not allowed to vote, the affiliation election did not meet minimal due process standards thus rendering the affiliation invalid. FIEA filed unfair labor practice charges and the Board found that SeaFirst had violated Section 8(a)(5) and ordered SeaFirst to bargain with the FIEA.[3]

SeaFirst then petitioned the Court of Appeals for the Ninth Circuit for review, but before it issued a decision the Board, sua sponte, moved that the case be remanded. The motion was granted and on reconsideration the Board held that because nonmembers were not permitted to participate in the affiliation election the election was invalid. The Board dismissed the unfair labor practice charges and vacated the amended certification.[4]

Thereafter, FIEA moved the Court of Appeals for the Ninth Circuit for review of the Board's Decision and Order. The Ninth Circuit held that requiring that nonunion employees be allowed to vote on affiliation questions was inconsistent with the Act.[5] Tho Board petitioned the Supreme Court for review. The Court affirmed the Ninth Circuit's decision, holding that minimum due process standards were present in the affiliation election, and that dissatisfaction with the decisions' union members make may be tested by a Board-conducted representation as, for example, if it is unclear whether the reorganized union

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[2] 241 NLRB 751 (1979).

[3] 245 NLRB 700 (1979). Additionally, after the Board amended FIEA's certification, the Retail Clerks International Union merged with the Amalgamated Meat Cutters and Butcher Workmen of North America to become the United Food and Commercial Workers International Union, AFL-CIO. The Board granted FIEA's motion to amend its name to reflect this change. Id. at 700 fn. 1.

[4] 265 NLRB 426 (1982).

[5] 752 F.2d 356 (1984).

retains majority support.[6] The Supreme Court remanded the case to the Ninth Circuit, which in turn remanded it to the Board. Thereafter, the parties submitted statements of position. During the pendency of this case at the Board, the Board issued its decision in *Western Commercial Transport*,[7] where the Board reviewed the impact of the Supreme Court's decision in *Financial Institution Employees* on the continuity of representative aspect of affiliation. The Board granted the parties' subsequent request to submit additional statements of position in light of that decision. The parties then filed additional statements of position and the Chamber of Commerce of the United States filed an amicus brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record, the statements of position and amicus brief and has decided to vacate its decision and order in *Seattle-First National Bank*, 265 NLRB 426 (1982), and to amend the certification and name the Financial Institution Employees of America, Local 1182, chartered by the United Food and Commercial Workers International Union, AFL-CIO, as the employee's exclusive bargaining representative.

The Board has traditionally required that two conditions be satisfied before granting a petition for amendment of certification based on an affiliation: the first is that the affiliation election itself satisfy minimum due process standards; the second requires substantial continuity between the pre- and post-affiliation bargaining representative.[8] A determination of whether an affiliation has so substantially altered a union's identity that a new

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[6] *NLRB v. Financial Institution Employees Local 1182*, 475 U.S. 192 (1986).

[7] 288 NLRB No. 27 (March 23, 1988).

[8] *Hammond Publishers, Inc.*, 286 NLRB No. 6 (Sept. 30, 1987).

representation election is required rests on an examination of the changes wrought by the affiliation.[9] In each case continuity is determined by a factual comparison between the pre- and post-affiliation representative. In *Western Commercial*, the Board found that that the affiliation of a small (136 employee unit), independent union with an entity representing 8500 employees and affiliated with an international union, did not result in continuity of representative. Relying on changes such as the wholesale replacement of union officers, the removal of day-to-day contract administration from local hands, and the loss of control over the assessment and expenditure of dues, the Board determined that membership rights and organizational autonomy were so diminished as to alter the "fundamental character of the representing organization." *Western Commercial*, slip op. at 14. The Board thus concluded that these changes were "sufficiently dramatic" to raise a question concerning representation and render inappropriate an amendment of certification. In the instant case, the Respondent contends that the affiliation has similarly resulted in changes, with respect to officers, limitation on membership rights, increased power of the executive council, and interference with the authority of the membership to call strikes, negotiate contracts, and settle grievances, that are sufficiently dramatic to alter its very character and, therefore, to raise a question concerning representation.[10] We disagree.

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[9] *NLRB v. Insulfab Plastics*, 789 F.2d 961 (1st Cir. 1986), enfg. 274 NLRB 817 (1985). *Western Commercial*, supra, slip op. at 11.

[10] The Respondent has made no further argument relating to procedural due process in the affiliation election, so that question is not before us. The Respondent argues, however, that the Supreme Court's opinion is to be read as inviting the Board to include, as part of a due process component of the continuity inquiry, a general examination of "the extent of [employee] opposition to the affiliation." We do not read the Supreme Court's opinion as inviting such an inquiry, which would be tantamount to the Board's conducting an informal poll concerning the affiliation among those

The record indicates that before affiliation FIEA operated statewide and was governed by an executive council which formulated policy and controlled the union's relationship with the Respondent. Negotiation of new contracts, processing grievances and regulation of internal union affairs were all handled by committees appointed by the FIEA president. Economic sanctions on the unit level could be undertaken only after being approved by the executive council and ratified by the members of the affected unit. The FIEA constitution allowed for union expansion to include other labor organizations or employees of other banks, and for affiliations.

A close examination of Local 1182 after affiliation persuades us that there was sufficient continuity in the representative to warrant an amendment of certification and a finding that the Respondent is obligated to bargain with Local 1182. The Respondent contends that Local 1182 now has different officers and that this is an indication of dramatic change resulting from the affiliation. The record, however, shows that after the affiliation, Local 1182's officers, and their responsibilities, remained the same as those who served for FIEA. In the year since affiliation, there has been a natural turnover of individuals occupying these offices. There is no evidence, however, that replacement of officers was a condition of the affiliation or a result of any

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to whom, the Court held, no opportunity to vote in the affiliation election need be extended. Of course, if we find, on the basis of objective factors, that the changes in a bargaining representative are sufficiently dramatic to alter its identity, we will find under *Western Commercial*, that a question concerning representation is raised and a Board election would be called for if the union were to continue to seek representative status. Also, a question may still be raised in the traditional manner, by a timely employee-filed decertification petition or by proof of objection considerations for good-faith doubt. The Respondent's proposal for directly investigating employee sentiment in virtually any affiliation case has no support either in the statute, Board precedent, or in the Supreme Court's opinion in this case.

action taken by the International. Compare *Western Commercial Transport*, slip op. at 9.

The Respondent next contends that the FIEA constitution specifically limited membership in the union to the Respondent's employees, while no such restriction exists under the RCIU constitution. As examination of the provisions in question indicates that while article III of the FIEA constitution, entitled "*Membership*," does limit eligibility to employees of the respondent, that limitation is subject to change upon approval of the executive council, to allow the inclusion of members of other labor organizations. Additionally, article VIII, entitled "*Affiliation*," and article IX, entitled "*Expansion*," specifically allow for the inclusion of other labor organizations or employees of other banks upon approval of the executive council and ratification of whatever amendments to the constitution are required. We thus find that these provisions of the FIEA constitution are entirely consistent with the expanded membership eligibility available under the RCIU constitution of Local 1182 and are not indicative of lack of continuity.

The Respondent also contends that the differences in eligibility requirements to hold union office further distinguish the pre- and post-affiliation entity. Under the RCIU constitution, a member must be in good standing for 1 year before being eligible to hold office, while the FIEA constitution required that a member must be in good standing for only 1 month. We note that the FIEA constitution additionally required a member, once nominated for office, to maintain good standing up to the election. The constitution did not specify the maximum length of time between the notice of the election and the election itself. In light of this, a member may be required to remain in good standing for a substantially longer period than the provision prescribes, thereby diminishing the practical differences between the two provisions. We also find it significant that the RCIU provision concerns only

the election of new officers, and does not require that the old officers must be replaced upon affiliation because they lack the requisite period of union membership. Thus, as noted above, the officers the FIEA retain their positions upon affiliation with RCIU.

The Respondent further contends that under the RCIU constitution, the local's executive council can accept or reject an employer's final contract offer without membership approval, whereas under the FIEA constitution all contracts were subject to the ratification of the membership. The evidence shows that under the RCIU constitution the executive council does have authority to accept or reject an employer's final contract offer, but can do so only after the failure of the membership of the affected local to approve a strike or other economic action. We find that under these circumstances the membership does have the opportunity to voice its approval or disapproval of a final offer and the executive council cannot bypass the membership as alleged by the Respondent.

Finally, the Respondent alleges that the RCIU constitution severely restricts the local's ability to call strikes, negotiate binding collective-bargaining agreements, and effectively to resolve grievances. Upon our examination of the comparable sections of the respective constitutions we find no merit to this contention. Under the FIEA constitution the local unit could employ economic sanctions, including engaging in strikes, but only after an affirmative vote of two-thirds of the executive council and ratification of the strike by 60 percent of the members of the affected unit. If the unit should strike without the approval of the executive council, the striking members of the unit would be subject to expulsion, suspension, or fines as a result of intentionally violating FIEA policy and rules. By comparison, under the RCIU constitution, strike action must be approved by the executive council and a two-thirds majority of the affected local's voting members. The strike must also have the approval of the International

president. The RCIU constitution indicates that the president's approval ensures compliance with the constitution and exhaustion of all amicable means of adjustment prior to engaging in economic sanctions in an effort to protect membership interests. If a local engages in a strike without approval, however, the penalty is only the denial of strike benefits.[11] The International also cannot force a local to participate in a strike.

With respect to local control of contract negotiations, the record indicates that under the RCIU constitution the terms of proposed collective-bargaining contracts must be submitted to the International president for approval *upon request* (emphasis added) prior to membership action. Donald Hofer, International vice president and director of the northwest division of the RCIU, testified that this requirement is to prevent sweetheart contracts that result in injury to other locals, and to safeguard the standards and integrity of the contract. Further, Hofer stated that during his association with the International this section of the constitution had not been enforced and the local unions negotiated their own contracts. The International provides assistance to a local only upon the local's request.

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[11] The Respondent contends, citing *Hansen v. Guyette*, 814 F.2d 547 (8th Cir. 1987), that the International could impose a trusteeship on a local because it fails to obtain authorization to strike. As we acknowledge that the International's constitution confers broad and pervasive powers, the evidence here discloses that the exercise of such authority is reserved for only the most compelling situations, to wit: the *Hansen* case. In that extraordinary case, a local union engaged in a protracted and violent strike, which commanded national attention—in every sense an atypical series of events. In our view, the fact that an international may exercise this potential authority does not defeat the conclusion that in most situations decisions to strike remain at the local level.

More relevant to our determination in this case is testimony that indicates in the previous 5 years trusteeship had been imposed on only 5 of approximately 215 locals, all as a result of financial irregularities. Of these five, one local requested the trusteeship in an effort to end chaos caused by factions within the local.

Finally, regarding grievance handling, the record shows that under the FIEA constitution grievances were managed by a grievance committee appointed by the president. Under the RCIU constitution, Local 1182's grievances are dealt with by the same personnel who were designated by the FIEA constitution to handle grievances. The International has assigned an advisory representative to assist the Local in these dispute resolution sessions.

Applying the test set forth by the Supreme Court in *Financial Institution*, as applied by the Board in *Western Commercial*, we find that the post-affiliation union meets the test of continuity. As set forth above, autonomy essentially remains at the local level, including day-to-day contract administration, handling of grievances, control of collective bargaining, and the calling of strikes. While some differences exist between the FIEA and the RCIU, these are not "sufficiently dramatic" to alter the identity of the bargaining representative and raise a question concerning representation. Accordingly, we find that by failing and refusing to recognize and bargain refusing to recognize and bargain [sic] with the RCIU the Respondent has violated Section 8(a)(5) and (1) of the Act.[12]

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[12] The Respondent contends that after affiliation Local 1182 possesses greater economic power than FIEA, thereby creating a different bargaining entity. We find this contention is without merit. See *Insulfab Plastics*, supra, at fn. 8 and *Hammond*, supra, at 15.

The Respondent contends that differences in the handling of union finances, the amendment process, membership meetings, and physical facilities manifest a lack of continuity. Little record evidence exists regarding these matters. For example, no membership meetings had been held by the time of the hearing and no amendments had been proposed. The alleged changes in the physical facility involved the relocation of the union's office from one room to another, just down the hall in the same building, and while different individuals controlled union finances, this was the result of turnover among the individuals holding the offices charged with financial responsibilities. We find these changes do not demonstrate a lack of continuity.

ORDER

The National Labor Relations Board orders that its Decision and Order in Case 19—CA—11364 (265 NLRB 426) is vacated in its entirety.

IT IS FURTHER ORDERED that the Board's Decision and Order in Case 19—CA—11364 (245 NLRB 700) is reinstated in its entirety.

IT IS FURTHER ORDERED that the Board's Decision and Amendment of Certification issued in Case 19—CA—23 (241 NLRB 751) is reinstated in its entirety.

Dated, Washington, D.C. July 29, 1988

JAMES M. STEPHENS, Chairman

MARSHALL B. BABSON, Member

MARY MILLER CRACRAFT, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX D

SUPREME COURT OF THE UNITED STATES

Nos. 84-1493 and 84-1509

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v

FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, LOCAL 1182, Chartered by UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO *et al.* (No. 84-1493)

SEATTLE-FIRST NATIONAL BANK,
Petitioner

v

FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, ETC., *et al.* (No. 84-1509)

Argued December 4, 1985. Decided February 26, 1986.

SYLLABUS BY REPORTER OF DECISIONS

In 1970, the National Labor Relations Board (Board) certified the Firstbank Independent Employees Association (Firstbank) as the collective-bargaining representative of a bargaining unit consisting of the employees of Seattle-First National Bank (SeaFirst), and successive collective-bargaining agreements were negoti-

ated. In 1978, in an election in which only union members were allowed to vote, Firstbank voted to affiliate with an international union and changed its name to the Financial Institution Employees of America, Local 1182 (FIEA). FIEA then petitioned the Board to amend its certification to reflect this change. After initially granting the petition and holding that SeaFirst had committed an unfair labor practice by refusing to recognize the amended certification or to bargain with FIEA, the Board, on reconsideration, held that, because nonunion employees were not allowed to vote in the affiliation election, the election did not meet minimal "due process" standards and that therefore the affiliation was invalid. Accordingly, the Board dismissed FIEA's unfair labor practice charge and vacated the amended certification. The Court of Appeals granted FIEA's petition for review of the Board's decision and remanded the case, holding that the Board's requirement that nonunion employees be allowed to vote on affiliation questions was irrational and inconsistent with the National Labor Relations Act (Act).

Held: The Board exceeded its authority under the Act in requiring that nonunion employees be allowed to vote for affiliation before it would order the employer to bargain with the affiliated union.

(a) Such requirement dramatically changes the scheme under which the Board's practice has been to grant an independent union's petition to amend the union's certification to reflect a name change resulting from affiliation with a national or international union if the Board found that union members had an adequate opportunity to vote on affiliation and that there was substantial "continuity" between the preaffiliation and postaffiliation union.

(b) Under the Act, the certified union must be recognized as the exclusive bargaining representative of all employees in the bargaining unit, and the Board cannot discontinue that recognition without determining that the affiliation of that union with another union raises a ques-

tion of representation and, if so, conducting an election to decide whether the certified union is still the choice of a majority of the unit. Here, by refusing either to amend FIEA's certification or to order SeaFirst to bargain, the Board effectively circumvented the decertification procedures provided for by the Act. Moreover, the Board's requirement that nonunion employees be allowed to vote in the affiliation election violated the policy Congress incorporated into the Act against outside interference in union decisionmaking.

(c) Employees' dissatisfaction with representation is not a reason for requiring the union to allow nonunion employees to vote on union matters like affiliation. Rather, the Act allows union members to control the shape and direction of the union. Dissatisfaction with the decision union members make may be tested by a Board-conducted representation election only if it is unclear whether the recognized union retains majority support. Any distinction between affiliation and other changes in a union's organization and structure does not justify the Board's meddling in the union's internal affairs.

(d) The Board's new rule contravenes the Act's assumption that stable bargaining relationships are best maintained by allowing an affiliated union to continue representing a bargaining unit unless the Board finds that the affiliation raises a question of representation. Such rule effectively gives the employer the power to veto an independent union's decision to affiliate, thereby allowing the employer to interfere directly with union decisionmaking that Congress intended to insulate from outside interference.

752 F2d 356, affirmed and remanded.

Brennan, J., delivered the opinion of the Court, in which White, Marshall, Blackmun, Powell, Rehnquist, Stevens, and O'Connor, JJ., joined. Burger, C. J., filed an opinion concurring in the judgment.

OPINION OF THE COURT

Justice Brennan delivered the opinion of the Court.

The question for decision in these cases is whether a rule of the National Labor Relations Board that requires that nonunion employees be permitted to vote in a certified union's decision whether to affiliate with another union is consistent with the National Labor Relations Act.

I

In 1970, the Board certified the Firstbank Independent Employees Association (Firstbank) as the collective-bargaining representative of a bargaining unit consisting of the employees of petitioner Seattle-First National Bank (SeaFirst). Firstbank and SeaFirst subsequently negotiated successive collective-bargaining agreements, the most recent of which expired in 1977. In 1978, Firstbank voted to affiliate with the Retail Clerks International Union, AFL-CIO. Under Firstbank's constitution, only union members in good standing could vote in the election. The union members voted in favor of affiliation by a margin of 1,206-774. Upon affiliation, Firstbank changed its name to the Financial Institution Employees of America, Local 1182 (FIEA), chartered by the Retail Clerks International Union, AFL-CIO. FIEA then petitioned the Board to amend its certification to reflect this change. SeaFirst challenged the petition, arguing that affiliation with the Retail Clerks had substantially changed the union, that nonunion employees should have been allowed to vote on whether to affiliate, and that the union had not followed its own constitution in establishing voter eligibility standards. The Board rejected these arguments and amended Firstbank's certification to name FIEA as the employees' bargaining representative. Seattle-First National Bank, 241 NLRB 751 (1979).[1]

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[1] After the Board amended FIEA's certification, the Retail Clerks International Union merged with the Amalgamated Meat Cutters

SeaFirst refused to recognize the amended certification or to bargain with FIEA. The Board sustained FIEA's charges and held that SeaFirst had committed an unfair labor practice in violation of §§ 8(a)(1) and 8(a)(5) of the Act, 29 USC §§ 158(a)(1) and 158(a)(5) [29 USCS §§ 158(a)(1) and 158(a)(5)], and ordered it to bargain.[2] Seattle-First National Bank, 245 NLRB 700 (1979). SeaFirst petitioned the Court of Appeals for the Ninth Circuit for review of the Board's order, and the Board cross-applied for enforcement. Before the Court of Appeals rendered its decision, the Board moved for remand of the case to it, and the court granted the motion. Seattle-First National Bank v NLRB, Nos. 79-7515, 80-7004 (June 27, 1980); see n 4, infra.

On remand, the Board notified the parties of its decision on its own motion to reconsider its earlier decision. On reconsideration, the Board held that, because nonunion employees were not allowed to vote in the affiliation election, the election did not meet minimal "due process" standards, and therefore that the affiliation was invalid. Accordingly, the Board dismissed FIEA's unfair labor charge and vacated the amended certification. Seattle-First National Bank, 265 NLRB 462 (1982).

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and Butcher Workmen of North America to become the United Food and Commercial Workers International Union, AFL-CIO. The Board granted FIEA's motion to amend the name of the charging party in this case to reflect this change. Seattle First National Bank, 245 NLRB 700, 700, n.1 (1979).

[2] Under § 8(a) of the Act, as set forth in 29 USC § 158(a) [29 USCS § 158(a)], "[i]t shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

. . . .

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

FIEA petitioned the Court of Appeals for the Ninth Circuit for review of the Board's decision. The Court of Appeals, in a 2-1 decision, granted the petition and remanded the case. 752 F2d 356 (1984). The court held that the Board's requirement that nonunion employees be allowed to vote on affiliation questions was irrational and inconsistent with the Act for three reasons. First, the Board's rule intruded upon the union's internal affairs—here a totally unjustified intrusion because the Board had not determined that affiliation had substantially changed the union or eroded its majority support—and violated the "longstanding federal labor policy of avoiding unnecessary interference in internal union affairs." Id., at 362. Second, the Board's rule was "inconsistent with the strong national policy of maintaining stability in the bargaining representative." Id., at 364. Pursuant to that policy, Congress and the Board had restricted the opportunities for employers and employees to challenge a certified union's status as bargaining representative,[3] and the Board's new rule did not further but breached the policy, since it effectively decertified the union without a Board determination that affiliation had undermined the union's majority support. Finally, the Board's rule was irrational, because the interests of nonunion employees were adequately protected under existing

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[3] The court cited three examples of Board rules designed to maintain stable bargaining relationships. 752 F2d at 365. First, in cases in which the employer is charged with refusing to bargain with a certified union, the union enjoys a presumption of majority status. For the first year after certification, this presumption is irrebuttable. See Brooks v NLRB, 348 US 96, 103, 99 L Ed 125, 75 S Ct 176 (1954). Second, the Board will consider "decertifying" a union only if at least 30% of the employees present a petition, or in "extreme cases." See 29 CFR § 101.18 (1985); R. Gorman, Basic Text on Labor Law 49-50 (1976). Third, under its contract-bar rule, the Board ordinarily refuses to conduct decertification elections for a certain period of time while the collective-bargaining agreement remains in effect. See 1 C. Morris, The Developing Labor Law 361-376 (2d ed 1983).

procedures, and because the Board's reasoning did not support the rule.

The holding of the Court of Appeals conflicts with contrary holdings of the Courts of Appeals for the Fifth and Seventh Circuits upholding the Board's rule. Local Union No. 4-14 v NLRB, 721 F2d 150, 152-153 (CA5 1983); United Retail Workers Union, Local 881 v NLRB, 774 F2d 752 (CA7 1985).[4] We granted both petitions in this case to to resolve the conflict. 471 US 1098, 85 L Ed 2d 838, 105 S Ct 2318 (1985). We affirm.

II

Section 7 of the Act guarantees employees the right "to bargain collectively through representatives of their own choosing," 29 USC § 157 [29 USCS § 157], and the Board is empowered to determine representation on petition of employees or the employer. 29 USC §§ 159(c)(1)(A)(i), 159(c)(1)(B) [29 USCS §§ 159(c)(A)(i), 159(c)(1)(B)]. In either case, the Board investigates the petition and holds a hearing if it has reasonable cause to

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[4] The procedural history of the Fifth Circuit's decision is closely intertwined with this case. In that case, the employer refused to bargain with an affiliated union because only union members had been allowed to vote on affiliation. The Board ordered the employer to bargain. Amoco Production Co., 220 NLRB 861 (1975), aff'd, 239 NLRB 1195 (1979). The Board relied on its Amoco decision when it originally amended FIEA's certification in this case. Amoco was then appealed to the Court of Appeals for the Fifth Circuit, which remanded the case for the Board to determine whether affiliation had substantially changed the union. Amoco Production Co. v NLRB, 613 F2d 107, 112 (1980). In light of the strong similarity between the two cases, the Board asked the Ninth Circuit to remand this case as well. On remand from the Fifth Circuit, the Board did not address whether affiliation had substantially changed the union. Rather, the Board reversed itself and concluded that the affiliation was invalid because only union members had been allowed to vote. Amoco Production Co., 262 NLRB 1240 (1982). The Board in turn relied on this decision in dismissing FIEA's unfair labor practice charge and revoking its amended certification.

believe that a "question of representation" exists, 29 USC § 159(c) [29 USCS § 159(c)], and directs a representation election by secret ballot to settle the question. Ibid. The Board certifies the winning union as the bargaining representaitve of all of the employees in the bargaining unit. The employer commits an unfair labor practice by refusing to bargain with the employees' certified bargaining representative. 29 USC § 158(a)(5) [29 USCS § 158(a)(5)].

The Act recognizes that employee support for a certified bargaining representative may be eroded by changed circumstances. In such cases, employees may petition the Board for another election, alleging that the certified representative no longer enjoys majority support. 29 USC § 159(c)(1)(A)(ii) [29 USCS § 159(c)(1)(A)(ii)]; 29 CFR §§ 101.17, 102.60(a) (1985). Similarly, an employer who questions whether a majority of employees continues to support a certified union may petition for another election. 29 USC § 159(c)(1)(B) [29 USCS § 159(c)(1)(B)]; 29 CFR §§ 101.17, 102.60(a) (1985); see 1 C Morris, The Developing Labor Law 349 (2d ed 1983). The employer, however, must "demonstrate by objective considerations that it has some reasonable grounds for believing that the union has lost its majority status." United States Gypsum Co. 157 NLRB 652, 656 (1966); 29 CFR § 101.17 (1985); see 1 Morris, supra. Again, if the Board determines, after investigation and hearing, that a question of representation exists, it directs an election by secret ballot and certifies the result. 29 USC § 159(c) [29 USCS § 159(c)].

One such change in circumstances is, as here, where an independent union decides to affiliate with a national or international organization.[5] In many such cases, the

[5] A local union may seek to affiliate with a larger organization for a variety of reasons. The larger organization may provide bargaining expertise or financial support, or may compensate for a lack of leadership within the local union. Amoco Production Co.,

union may also change its name to reflect its new affiliation, and will petition the Board to amend its certification to reflect this name change. 29 CFR §§ 101.17, 102.60(b) (1985). The Board's practice has been to grant such petitions if the Board found that the affiliation satisfied two conditions. First, that union members have had an adequate opportunity to vote on affiliation. North Electric Co. 165 NLRB 942, 943 (1967). The Board ordinarily required that the affiliation election be conducted with adequate "due process" safeguards, including notice of the election to all members, an adequate opportunity for members to discuss the election, and reasonable precautions to maintain ballot secrecy. E.g., Newspapers Inc. 210 NLRB 8, 9 (1974), enf'd, 515 F2d 334 (CA5 1975).[6] Second, that there was substantial "continuity" between the pre- and post-affiliation union. The focus of this inquiry was whether the affiliation had substantially changed the union; the Board considered such factors as whether the union retained local autonomy and local officers, and continued to follow established procedures. See Note, supra n 5, at 445, and nn 74-82.[7] If the organiza-

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239 NLRB, at 1195; Hale, Union Affiliations: Examination of Governing NLRA Standards, 1983 Det C L Rev 709. Affiliation "is but one of many ways in which labor organizations alter their structures and alignments in response to changing economic and political conditions." Note, Union Affiliations and Collective Bargaining, 128 U Pa L Rev 430, 431 (1979). The Board has recognized that a union "must remain largely unfettered in its organizational quest for financial stability and aid in the negotiating process." The Williamson Co., 244 NLRB 953, 955 (1979).

[6] The union suggests that it may even be inappropriate for the Board to impose due process safeguards with respect to union members. Brief for FIEA 28-29. While we note that the NLRA does not require unions to follow specified procedures in deciding matters such as affiliations, we need not assess the propriety of the Board's past procedures.

[7] The parties disagree over whether affiliation substantially changed the union in this case. See Brief for NLRB 4, and n 2; Brief for FIEA 4. However, the Board did not make a continuity

tional changes accompanying affiliation were substantial enough to create a different entity, the affiliation raised a "question concerning representation" which could only be resolved through the Board's election procedure. 1 Morris, supra, at 690; 29 CFR §§ 101.17, 102.60(b) (1985). However, as long as continuity of representation and due process were satisfied, affiliation was considered an internal matter that did not affect the union's status as the employees' bargaining representative, and the employer was obligated to continue bargaining with the reorganized union. 1 Morris, supra, at 690-691; Universal Tool & Stamping Co. 182 NLRB 254, 259 (1970).[8]

The Board's new rule dramatically changes this scheme.[9] The Board now takes the position that all employees in the

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determination but simply dismissed FIEA's unfair labor practice charge and vacated its amended certification. The Court of Appeals therefore declined to address the continuity issue. 752 F2d, 356, 359, n 4 (1984). We also decline to address it.

[8] In some cases, the affiliated union will not petition the Board to amend its certification, but will instead wait to see whether the employer will continue to bargain. If the employer refuses to bargain, the union may then file an unfair labor practice charge with the Board. In the past, the Board required the employer to bargain if the affiliation satisfied its two-prong due process and continuity test. In other words, the Board used the same standards to examine affiliations whether the issue arose as a defense to an unfair labor practice charge or in a petition to amend a certification. Independent Drug Store Owners of Santa Clara County, 211 NLRB 701, 701, n 2 (1974), enf'd, 528 F2d 1225 (CA9 1975); Hale, supra n 5, at 710, and n 8; Note, supra n 5, at 432.

[9] The Board's assertion that it actually adopted its "new" rule in its decision in Jasper Seating Co., 231 NLRB 1025 (1977), may be questioned. Jasper was a 3-2 decision in which only two members took the position that nonunion employees should be allowed to vote in affiliation elections. While suggesting that he could adopt this position under other circumstances, Member Penello concurred in the decision "based upon the application of [different] principles." Id., at 1026. He found that the affiliation had raised a question of representation which could only be resolved through a Board-conducted representation election. Id., at 1027.

bargaining unit—not merely union members—must have the opportunity to participate in the affiliation decision. See Amoco Production Co. 262 NLRB 1240, 1241 (1982). Unless they are allowed to do so, the Board will not amend the union's certification or require the employer to bargain with the reorganized union. The Board applies this rule even though the organizational changes resulting from affiliation are not substantial enough to raise a question of representation. See Brief for NLRB 16-17. The Board does not contend that the Act requires that all employees of the bargaining unit, union and nonunion, must be allowed to participate in the affiliation election or that the Act expressly authorizes the Board to impose such requirements. Rather, the Board and the employer defend the Board's new rule on two grounds. First, they assert that the Board's rule is a reasonable means of protecting the bargaining unit employees' right to select a bargaining representative under § 7 of the Act. Second, they argue that the rule minimizes industrial strife. We address each argument in turn.

III

A

Petitioners argue that the Board should be afforded "a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees," NLRB v A. J. Tower Co. 329 US 324, 330, 91 L Ed 322, 67 S Ct 324 (1946); see also 29 USC § 156 [29 USCS § 156]; NLRB v Wyman-Gordon Co. 394 US 759, 767, 22 L Ed 2d 709, 89 S Ct 1426 (1969); NLRB v Waterman S.S. Corp. 309 US 206, 226, 84 L Ed 704, 60 S Ct 493 (1940), and contend that a requirement that all employees be allowed to vote on affiliation is a reasonable means of insuring that a majority of employees consent to representation by the postaffiliation union, and ultimately of protecting the right of all employees to select a bargaining representative. Our cases have previously recognized the

Board's broad authority to construe provisions of the Act, and have deferred to Board decisions that are not irrational or inconsistent with the Act. Ford Motor Co. v NLRB, 441 US 488, 495, 497, 60 L Ed 2d 420, 99 S Ct 1842 (1979); Beth Israel Hospital v NLRB, 437 US 483, 501, 57 L Ed 2d 370, 98 S Ct 2463 (1978); NLRB v Iron Workers, 434 US 335, 350, 54 L Ed 2d 586, 98 S Ct 651 (1978). However, the question here is whether the Board's new rule exceed the Board's statutory authority. Cf. NLRB v Longshoreman, 473 US 61, 87 L Ed 2d 47, 105 S Ct 3045 (1985); NLRB v Bildisco & Bildisco, 465 US 513 (1984), 79 L Ed 2d 482, 104 S Ct 1188. Deference to the Board "cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption . . . of major policy decisions properly made by Congress." American Ship Building Co. v NLRB, 380 US 300, 318, 13 L Ed 2d 855, 85 S Ct 955 (1965); see also NLRB v Insurance Agents, 361 US 477, 499, 4 L Ed 2d 454, 80 S Ct 419 (1960). We hold that the Board's new rule exceeds its authority under the Act.

Under the Act, the certified union must be recognized as the exclusive bargaining representative of all employees in the bargaining unit, and the Board cannot discontinue that recognition without determining that the affiliation raises a question of representation and, if so, conducting an election to decide whether the certified union still is the choice of a majority of the unit. 29 USC § 159 (c) [29 USCS § 159(c)]. Of course, as is the case with any organizational and structural change, a new affiliation may substantially change a certified union's relationship with the employees it represents. These changed circumstances may in turn raise a "question of representation," if it is unclear whether a majority of employees continue to support the reorganized union. Thus, in these situations, the affiliation implicates the employees' right to select a bargaining representative, and to protect the employees' interests, the situation may require that the

Board exercise its authority to conduct a representation election. 29 USC § 159(c)(1) [29 USCS § 159(c)(1)]. However, the Board's decision must take into account that "[t]he industrial stability sought by the Act would unnecessarily be disrupted if every union organizational adjustment were to result in displacement of the employer-bargaining representative relationship." Canton Sign Co. 174 NLRB 906, 909 (1969), enf. denied on other grounds, 457 F2d 832 (CA6 1972). In many cases, a majority of employees will continue to support the union despite any changes precipitated by affiliation.[10] In such situations, affiliation does not necessarily implicate the "selection" of a new bargaining representative. The reorganized union may legitimately claim to succeed as the employees' duly selected bargaining representative, and in that case retains a legitimate interest in continuing to bargain collectively with the employer. The Act balances these competing concerns by authorizing the Board to conduct a representation election *only* where affiliation raises a question of representation. 29 USC § 159(c) [29 USCS § 159(c)]. Conversely, where affiliation does not raise a question of representation, the statute gives the Board no authority to act. The Board's new rule upsets the accommodation drawn by the statute by effectively decertifying the reorganized union even where affiliation does not raise a question of representation.

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[10] The Board has recognized that "affiliation does not directly involve the employment relation. The status of wages, working conditions, benefits, and grievance procedures is unaffected by the affiliation vote; the collective-bargaining agreement between the union and the employer remains effective until the stated expiration date." Amoco Production Co., 239 NLRB, at 1195. Affiliation "has no probative value concerning the employees' choice of the [union] as their collective bargaining representative." American Range Lines, Inc., 13 NLRB 139, 154 (1939); see also Brief for NLRB 16, n 10 ("The Board has in general found that affiliations do not destroy continuity of representation").

Turning to the record in these cases, the Board revoked FIEA's certification and relieved SeaFirst of its obligation to bargain despite the fact, as the Board acknowledges, that it was not sufficient to raise a question of representation that non-union employees were not allowed to vote in the affiliation election. Brief for NLRB 16-17. Absent a question of representation, FIEA continued to function, as it was entitled to do, as the bargaining representative of the unit, and SeaFirst was obligated to continue bargaining with it. By refusing either to amend FIEA's certification or to order SeaFirst to bargain, the Board effectively circumvented the decertification procedures provided for by statute. Moreover, the Board exceeded its statutory authority by requiring that nonunion employees be allowed to vote in the union's affiliation election. This violated the policy Congress incorporated into the Act against outside interference in union decisionmaking. See Steelworkers v Sadlowski, 457 US 102, 117, 72 L Ed 2d 707, 102 S Ct 2339 (1982); NLRB v Boeing Co. 412 US 67, 71, 36 L Ed 2d 752, 93 S Ct 1952 (1973); Scofield v NLRB, 394 US 423, 428, 22 L Ed 2d 385, 89 S Ct 1154 (1969); NLRB v Allis-Chalmers Mfg. Co. 388 US 175, 195, 18 L Ed 2d 1123, 87 S Ct 2001 (1967). Petitioners maintain that this policy must give way to the right of the employees to select a bargaining representative. Cf. Pattern Makers v NLRB, 473 US 95, 87 L Ed 2d 68, 105 S Ct 3064 (1985) (union rule barring resignations during a strike contrary to statutory policy of voluntary unionism); NLRB v Marine Workers, 391 US 418, 20 L Ed 2d 706, 88 S Ct 1717 (1968) (union rule requiring exhaustion of internal grievance procedures does not preclude Board review). But the Act establishes a specific election procedure to decide whether the employees desire a change in a certified union's representative status. While the Board is charged with responsibility to administer this procedure, the Act gives the Board no authority to re-

quire unions to follow other procedures in adopting organizational changes.[11]

B

Petitioners contend that this statutory scheme does not adequately protect the interests of nonunion employees, and that this justifies the Board's new rule. They argue that an affiliation may affect a union's representation of the bargaining unit even if it does not raise a question of representation, but that argument overlooks the fact that a union makes many decisions that "affect" its representation of nonmember employees. It may decide to call a strike, ratify a collective-bargaining agree-

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[11] Congress has expressly declined to prescribe procedures for union decisionmaking in matters such as affiliation. When the NLRA was amended by the Labor Management Relations Act of 1947, the House passed a proposal that would have regulated union procedures for electing officers, assessing dues, disciplining members, and deciding to strike. HR 3020, § 8(c), 80th Cong, 1st Sess (1947), 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, pp 179-183 (Legis Hist). These provisions were deleted from the final legislation. See 93 Cong Rec 6443 (1947), 2 Legis Hist 1540 ("The Senate conferees . . . felt that it was unwise to authorize [the NLRB] to undertake such elaborate policing of the internal affairs of unions"). In 1959, Congress adopted the Labor-Management Reporting and Disclosure Act, which regulated union procedures for assessing dues, disciplining employees, and electing officers. 29 USC §§ 411-414, 481 [29 USC §§ 411-415, 481]. Senators Knowland and McClellan both advanced proposals to regulate other sorts of union decisions. See 104 Cong Rec 11184 (1958) (constitutional amendments and recall of officers); id., at 11461 (waiver of right to strike); S 1137, § 102(5), 86th Cong, 1st Sess (1959). 1 Legislative History of the Labor-Management Reporting and Disclosure Act 272-273 (1959) (creation of affiliated organizations or funds), § 103(4), id., 277 (mergers and transfers between local unions). None of these proposals was incorporated into the statute. See Steelworkers v Sadlowski, 457 US 102, 117, 72 L Ed 2d 707, 102 S Ct 2339 (1982) ("Congress was guided by the general principle that unions should be left free to 'operate their own affairs, as far as possible.' It believed that only essential standards should be imposed by legislation" (citations omitted)).

ment, or select union officers and bargaining representatives. Under the Act, dissatisfied employees may petition the Board to hold a representation election, but the Board has no authority to conduct an election unless the effects complained of raise a question of representation. In any event, dissatisfaction with representation is not a reason for requiring the union to allow nonunion employees to vote on union matters like affiliation. Rather, the Act allows union members to control the shape and direction of their organization, and "[n]on-union employees have no voice in the affairs of the union." Allis-Chalmers, 388 US, at 191, 18 L Ed 2d 1123, 87 S Ct 2001. We repeat, dissatisfaction with the decisions union members make may be tested by a Board-conducted representation election only if it is unclear whether the reorganized union retains majority support.

Petitioners concede that a union's organizational and structural changes would not ordinarily justify the Board's meddling in a union's internal affairs, but argue that affiliation is different from other changes because affiliation necessarily changes the union's identity, and because initiation of the change is by the certified union seeking the Board's approval for the affiliation by amendment of its certification or an order on the employer to bargain after affiliation. Neither distinction is persuasive.

First, petitioners argue that affiliation differs from other organizational changes because it results in employees being represented by a different organization. See Hamilton Tool Co. 190 NLRB 571, 576 (1971) (Miller, concurring). But many organizational or structural changes may operate to alter a union's "identity." This would be the case where the union amends its constitution or bylaws, restructures its financial obligations and resources, or alters its jurisdiction. The fact that an affiliation is often accompanied by a formal name change does not serve to distinguish it from other organizational developments. As the Board has recognized, "an affilia-

tion does not create a new organization, nor does it result in the dissolution of an already existing organization." Amoco Production Co. 239 NLRB 1195 (1979). Rather, the union will determine "whether any administrative or organizational changes are necessary in the affiliating organization." Ibid. If these changes are sufficiently dramatic to alter the union's identity, affiliation may raise a question of representation, and the Board may then conduct a representation election. Otherwise, the statute gives the Board no authority to interfere in the union's affairs.

Petitioners next contend that affiliation involves the union's asking the Board to amend its certification or to order the employer to bargain.[12] Petitioners assert that the Board therefore has a strong interest in insuring that its own election procedures have not been circumvented before placing its imprimatur on the union's affiliation election. This argument mischaracterizes the nature of the relevant procedures. In amending the union's certification or ordering the employer to bargain, the Board does not "sanction" the union's affiliation. Rather, it signifies only that the reorganized union con-

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[12] In its amicus brief, the Chamber of Commerce notes that the statute does not explicitly provide for petitions to amend a union's certification, and argues that the Board therefore has broad authority to refuse to grant such requests. However, because the union's request to amend its certification is a mere formality, it cannot give the Board additional authority to police the affiliation. A union could simply decide not to change its name upon affiliation, and would not have to ask the Board to amend its certification. The employer might then challenge the affiliation as a defense to an unfair labor practice charge. Unless the Board finds that the affiliation raised a question of representation, the affiliated union would continue as the employees' bargaining representative, and the employer would be required to bargain with the reorganized union. Thus, the amended certification procedure cannot broaden the Board's authority to interfere in the union's affairs.

tinues as an ongoing entity that the employer should continue to recognize. By analogy, the fact that the Board may order the employer to bargain with a union that has amended its constitution does not mean that the Board has "sanctioned" the constitutional amendment. In any event, the Board's interest in insuring the integrity of its procedures does not empower it to adopt measures exceeding its statutory authority. If the Board finds that affiliation raises a question of representation "undermining . . . the Board's own election and certification procedures," Amoco Production Co. 262 NLRB, at 1241, it can refuse to consider the union's unfair labor practice charge, and is authorized to conduct a representation election. However, it may not condone an employer's refusal to bargain in the absence of a question of representation, and has no authority to prescribe internal procedures for the union to follow in order to invoke the Act's protections.

IV

The basic purpose of the National Labor Relations Act is to preserve industrial peace. 29 USC § 151 [29 USCS § 151]. The Act includes several provisions designed to encourage stable bargaining relationships, e.g., § 8(b)(7)(A), 29 USC § 158(b)(7)(A) [29 USCS § 158(b)(7)(A)] (prohibiting recognitional picketing by employees represented by recognized union); § 8(b)(7)(B), 29 USC § 158(b)(7)(B) [29 USCS § 158(b)(7)(B)] (prohibiting recognitional picketing for one year after election); § 9(c)(3), 29 USC § 159(c)(3) [29 USCS § 159(c)(3)] (prohibiting second representation election within one year), and the Board has devised rules to achieve the same ends. See n 3, supra. Petitioners argue that the Board's new rule furthers this policy by introducing a measure of certainty into the bargaining relationship that protects both the employer and the union. By having all employees vote for affiliation, so the argument goes, the employer avoids the possibility of having

to bargain with a union that may not represent a majority of the employees. Petitioners submit that the union also benefits from having all employees vote, since it avoids the disruption that would occur if the Board eventually determines that it must hold a new election because the affiliation raises a question of representation. If the employees vote for affiliation, the union can continue to bargain with confidence, since the employer is less likely to challenge the affiliation, and the Board is less likely to find a question of representation. If the employees vote against affiliation, the incumbent union can forgo affiliation and continue to represent the bargaining unit.

Absent any statutory framework, the Board's rule might well be a rational means of preserving industrial stability. However, as the Ninth Circuit noted, Congress has already determined "as a matter of national labor policy that bargaining stability and the principle of majority rule may limit the timing of employee challenges to their certified bargaining representative's majority status." 752 F2d, at 366. The Act assumes that stable bargaining relationships are best maintained by allowing an affiliated union to continue representing a bargaining unit unless the Board finds that the affiliation raises a question of representation. The Board's rule contravenes this assumption, since an employer may invoke a perceived procedural defect to cease bargaining even though the union succeeds the organization the employees chose, the employees have made no effort to decertify the union, and the employer presents no evidence to challenge the union's majority status. Any uncertainty on the employer's part does not relieve him of his obligation to bargain collectively. "If an employer has doubts about his duty to continue bargaining, it is his responsibility to petition the Board for relief . . . . To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to [industrial peace]." Brooks v NLRB, 348 US 96, 103, 99 L Ed

125, 75 S Ct 176 (1954). The Board's rule effectively gives the employer the power to veto an independent union's decision to affiliate, thereby allowing the employer to directly interfere with union decisionmaking Congress intended to insulate from outside interference.

We hold that the Board exceeded its authority under the Act in requiring that nonunion employees be allowed to vote for affiliation before it would order the employer to bargain with the affiliated union.[13] The judgment of the Court of Appeals is affirmed. The cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

SEPARATE OPINION

Chief Justice Burger, concurring in the judgment.

I write separately to note that the Court's action today striking down a Board action is one of those rare departures from this Court's long history of special deference to the Board's decisions concerning the selection of an exclusive bargaining unit representative by employees. See, e.g., NLRB v A. J. Tower Co., 329 US 324, 330, 91 L Ed 322, 67 S Ct 324 (1946); see also NLRB v Action Automotive, Inc., 469 US 490, 83 L Ed 2d 986, 105 S Ct 984 (1985).

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[13] We do not suggest, however, that other Board representation procedures, such as its continuity determination, exceed its statutory authority.

Respondents argue that the Board's rule is irrational because it assumes that affiliation involves the selection of a new bargaining representative absent any indication that the affiliation has significantly changed the union. Because we conclude that the Board has exceeded its authority under the statute, we need not address this issue.

APPENDIX E

245 NLRB No. 88

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 19-CA-11364

SEATTLE-FIRST NATIONAL BANK *and* FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, LOCAL NO. 1182, CHARTERED BY UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO.[1]

September 28, 1979

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS MURPHY AND TRUESDALE

Upon a charge filed on May 8, 1979, by Financial Institution Employees of America, Local No. 1182, chartered by United Food and Commercial Workers International Union, AFL-CIO, herein called the Union, and duly served on Seattle-First National Bank, herein called Respondent, the General Counsel of the National Labor

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[1] The General Counsel moved to amend the name of the Charging Party. Financial Institution Employees of America, Local No. 1182, chartered by Retail Clerks International Union, AFL-CIO, to reflect the current name of the International Union. We hereby grant that motion.

Relations Board, by the Regional Director for Region 19, issued a complaint and notice of hearing on May 21, 1979, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on April 5, 1979, following a hearing in Case 19-AC-23, the Board issued its Decision and Amendment of Certification (241 NLRB 751), amending the certification in Cases 19-RM-816 and 19-RC-5301 by substituting "Financial Institution Employees of America, Local No. 1182, chartered by Retail Clerks International Union, AFL-CIO," for "Firstbank Independent Employees Association," herein called FIEA, as the certified bargaining representative of the employees of Respondent in the unit found appropriate in Cases 19-RM-816 and 19-RC-5301,[2] and that commencing on or about April 5, 1979, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On May 31, 1979, Respondent filed its answer to the complaint admitting

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[2] Official notice is taken of the records in the representation and amendment of certification proceedings, Cases 19-RM-816, 19-RC-5301, and 19-AC-23, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1976), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1968); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C. Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); and Sec. 9(d) of the NLRA, as amended.

in part, and denying in part, the allegations in the complaint. It also filed an application for *subpoena duces tecum*. The Union filed a response to that application. Thereafter, the Union filed a motion for an appropriate remedy, and Respondent filed a response.

On June 12, 1979, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on June 19, 1979, the Board issued an order transfering the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answers to the notice and the complaint, Respondent, in effect, is attempting to relitigate the issues raised in the amendment of certification proceeding. However, Respondent also argues that it has new evidence showing, *inter alia*, that officers of FIEA have been replaced, that statements made by the Union before the affiliation vote have proved unfounded or inaccurate, and that it has possession of numerous petitions from employees indicating that they disagree with the way the affiliation vote was conducted. Respondent, therefore, contends that if the complaint is not dismissed, it should be granted a hearing.[3] We reject this contention. In

[3] Respondent also argues that the Board Decision in *Amoco Production Company*, 239 NLRB 1195 (1979) (Member Truesdale concurring, Members Jenkins and Penello dissenting separately),

Amoco, supra, the Board held that a union affiliation proceeding was essentially an internal union matter in which the Board will generally not involve itself. Under *Amoco* the alleged new evidence, even if adduced and credited, would have no effect on the validity of the affiliation vote. We therefore find that Respondent has not raised any issues which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.[4]

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is a banking association with an office and place of business in Seattle, Washington, where it is engaged in commercial banking and services. During the past 12 months, a representative period, Respondent has provided services valued in excess of $50,000 directly to customers outside the State of Washington.

We find, on the basis of the foregoing, that Respondent is and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Financial Institution Employees of America Local No. 1182, chartered by United Food and Commercial Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

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should not be applied retroactively. However, Respondent has failed to demonstrate how the application of *Amoco, supra,* would be an unjust burden on Respondent.

[4] The Union's motion for attorneys' fees and other expenses, however, is hereby denied because we cannot conclude that Respondent's defense was "patently frivolous." *Heck's Inc.,* 215 NLRB 765 (1964).

III. THE UNFAIR LABOR PRACTICE

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All employees employed by Respondent in the State of Washington, excluding officers, management trainees, professional employees, confidential employees, and supervisors and guards as defined in the Act.

2. The certification

On April 5, 1979, the Board amended the certification in Case 19-AC-23 to substitute the Union for FIEA as the bargaining representative of the employees in said unit for the purpose of collective bargaining with Respondent. Since April 5, 1979, the Union has been and continues to be the exclusive representative of the employees in said unit within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about April 5, 1979, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about April 5, 1979, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since April 5, 1979, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representa-

tive of the employees in the appropriate unit and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and if an understanding is reached, embody such understanding in a signed agreement.

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Seattle-First National Bank, State of Washington, is an employer engaged in comerce within the meaning of Section 2(6) and (7) of the Act.

2. Financial Institution Employees of America, Local No. 1182, chartered by United Food and Commercial Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees employed by Respondent in the State of Washington, excluding officers, management trainees, professional employees, confidential employees, and supervisors and guards as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since November 30, 1970, the above-named labor organization as amended on April 5, 1979, has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about April 5, 1979, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Seattle-First National Bank, Seattle, Washington, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, and other terms and conditions of employment with Financial Institution Employees of America, Local No. 1182, chartered by United Food and Commercial Workers International Union, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All employees employed by Respondent in the State of Washington, excluding officers, management trainees, professional employees, confidential employees, and supervisors and guards as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to pay, wages, hours, and other terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its various locations where bargaining unit employees are employed copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms

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[5] In the event that this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading

provided by the Regional Director for Region 19, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

"Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Financial Institution Employees of America, Local No. 1182, chartered by United Food and Commercial Workers International Union, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All employees employed by the Employer in the State of Washington, excluding officers, management trainees, professional employees, confidential employees, and supervisors and guards as defined in the Act.

SEATTLE-FIRST NATIONAL BANK

APPENDIX F

241 NLRB No. 116

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 19-AC-23

SEATTLE-FIRST NATIONAL BANK AND FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, LOCAL 1182, CHARTERED BY RETAIL CLERKS INTERNATIONAL UNION, AFL-CIO,
Petitioner.

April 5, 1979

DECISION AND AMENDMENT OF CERTIFICATION

BY CHAIRMAN FANNING AND MEMBERS MURPHY AND TRUESDALE

On November 30, 1970, the Board, in Cases 19-RM-816 and 19-RC-5301, certified the Firstbank Independent Employees Association (herein FIEA or Petitioner) as the collective-bargaining representative in an appropriate unit of all the Employer's employees within the State of Washington, excluding professional employees, confidential employees, management trainees, and supervisors and guards as defined in the Act. On June 19, 1978, the Petitioner filed this petition to amend the certification to change the name of the certified bargaining agent from "Firstbank Independent Employees Association" to "Financial Institution Employees of America, Local 1182, chartered by Retail Clerks International Union, AFL-CIO."

A hearing was held on the petition on July 26 and 27, 1978, before Hearing Officer Lynne C. Litwiller at Seattle, Washington. All parties appeared at the hearing and were given full opportunity to participate therein. After the hearing, the Petitioner and the Employer filed briefs with the Regional Director. Thereafter, the Regional Director transferred the case to the Board for decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The rulings of the Hearing Officer are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this case, the Board finds: [1]

FIEA has had a collective-bargaining agreement with the Employer since 1971. The current collective-bargaining agreement was terminated by the Employer on October 30, 1977.

During 1977, the executive council of FIEA authorized its bargaining committee to explore affiliation with other unions. The committee, after contacting several unions, voted unanimously to seek affiliation with the Retail Clerks International Union. The affiliation agreement was unanimously approved by the executive council of FIEA.

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[1] The Petitioner filed a brief, differing slightly from that filed with the Regional Director, with the Board. The Employer has moved to strike this brief as not being in compliance with Sec. 102.67(i) of the Board's Rules and Regulations, Series 8, as amended. We agree and grant the Employer's motion to strike. The Petitioner has moved to consolidate this case with Cases 19-CA-9835 and 19-CA-9916, also issued this day at 241 NLRB No. 117. The Employer filed a memorandum in opposition. We find that the cases are not similar enough in law or fact to warrant consolidation, and the Petitioner's motion is hereby denied. The Employer has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

A notice was mailed to all unit representatives (the equivalent of shop stewards) informing them of meetings to be held throughout the State on January 6, 7, and 8, 1978.[2] At these meetings the unit representatives were informed of the terms of affiliation, the election procedure, and the standards for voter eligibility. In order to vote an individual had to be either a current member of FIEA or join by January 19 and pay 1 month's dues of $4. The unit representatives were instructed to contact all unit employees and inform them of the pending affiliation vote and specifically to contact nonmembers and explain to them the eligibility standards. Concurrently a letter was sent to all unit employees informing them of the pending election and the eligibility requirements. After this initial meeting other meetings were held at all work locations. These meetings were attended by officials of both FIEA and the Retail Clerks International Union and were open to all unit employees. On or about January 17 another letter was sent to all unit employees reiterating the eligibility standards.

On January 20 a notice was sent to all FIEA members informing them that a affiliation secret-ballot election would be conducted by the Washington State Public Employment Relations Commission (PERC). The ballots were to be mailed by February 5 and had to be back to PERC by February 21. The notice stated the ballot question and contained additional information regarding the locations of meetings being held throughout the State on February 4 and 5. These meetings were again attended by representatives of both Unions who spoke about the affiliation and answered questions. Two other informational letters were sent to FIEA members before the meetings.

PERC mailed the ballots on February 4 to 2,624 members; there were approximately 4,800 employees in the

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[2] Hereinafter all dates are in 1978.

unit. The results were 1,206 votes for affiliation and 774 against. FIEA applied for, and on April 1 was granted, a charter by the Retail Clerks International Union.

The Employer attacks the affiliation on the grounds that: (1) the substitution of the Petitioner for FIEA is a substantial change in the bargaining representative and thus raises a "question concerning representation" requiring a Board-conducted election; (2) only members of FIEA were allowed to vote; and (3) FIEA did not follow its own constitution in establishing voter eligibility standards.

This case is controlled by our recent second Supplemental Decision and Order in *Amoco Production Company*.[3] Regarding the Employer's first argument, as we said in *Amoco (Id.)*

> [a]n affiliation does not create a new organization, nor does it result in the dissolution of an already existing organization. The organizations participating in the affiliation determine whether any administrative or organizational changes are necessary in the affiliating organization.[4]

[4] [O]nly union members will be affected by any change in the constitution and internal union rules and regulations, as they have voluntarily agreed to do by virtue of the majority within their ranks having chosen to affiliate.

Similarly, the Employer's second argument is also lacking in merit.

> Since we view an affiliation vote as basically concerned with the organization and structure of the union and not the representational status of employees, it is the sort of internal union matter into which the Board does not ordinarily intrude. The Board

[3] 239 NLRB 1195 (1979). Member Truesdale concurring. Members Jenkins and Penello dissenting separately.

> determines whether the vote was conducted with adequate due process: including, for example, proper notice to all members, an orderly vote, and some reasonable precautions to maintain the secrecy of the ballot.[4]

The Employer is not contending that there was any irregularity or impropriety in PERC's administration of the election, and it is readily apparent from the facts that "[a]dequate notice, discussion and time for reflection were provided all members before the election." [5]

The Employer argues that the election was deficient because the voter eligibility requirements were not in accordance with the FIEA constitutional requirement that only members in good standing as of the last day of the month preceding the notice of election shall be allowed to vote (here December 30). But FIEA permitted members to vote who were on the last dues-checkoff list submitted by the Employer for October 1977 as well as employees joining as late as January 19.

The Petitioner contends that its actions were reasonable in the circumstnaces. The Petitioner alleges that the Employer put it in this delimma by terminating dues checkoff. The Petitioner was consequently faced with the difficult, if not impossible, task of determining who, in this sizable unit spread over the State of Washington in approximately 171 locations, was a current dues-paying member. It therefore decided that anyone who joined and paid 1 month's dues before January 19 would be eligible to vote. The Petitioner also argues that its conduct was intended to, and in fact did, enfranchise unit members. Moreover, the Petitioner submits that there is no evidence that FIEA's actions were intended to undermine, or resulted in the undermining of, the electoral process.

We agree with the Petitioner. In the circumstances the

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[4] *Id.* 3-4.

[5] *Id.*

broadening of the franchise does not support denial of the petition under our decision in *Amoco, supra.* We therefore find that the Employer's arguments are without merit.

In view of the foregoing, we shall amend the certification in Cases 19-RM-816 and 19-RC-5301 to reflect the current name and affiliation of the certified Union. This amendment is not to be considered as a new certification or recertification.

ORDER

It is hereby ordered that the petition to amend the certification filed by the Financial Institution Employees of America, Local 1182, chartered by Retail Clerks International Union, AFL-CIO, be, and it hereby is, granted, and that the decision and Certificate of Representative in Cases 19-RM-816 and 19-RC-5301 be amended by substituting "Financial Institution Employees of America, Local 1182, chartered by Retail Clerks International Union, AFL-CIO" for "Firstbank Independent Employees Association."

APPENDIX G

EXCERPTS FROM RCIU CONSTITUTION

(Exhibit E-1)

Section 8 (B)

(B) The International Executive Board shall have power to authorize strikes or other economic action in conformity with the Constitution and laws of the International Union, when necessary to defend the organization in any locality against the attacks of employers, combinations, lockouts, or any attempt to disrupt or destroy the organization; to support such actions by levying a per capita tax assessment and by ordering a cessation of work for any employer involved, irrespective of where such work is located. . . .

Section 32 (A)

(A) The terms of proposed collective bargaining contracts shall be submitted to the office of the International President for approval upon request prior to membership action thereon. Such approval shall be for the purpose of determining whether the aforementioned terms conform to the applicable established policies, practices, and objectives of the International Union relating to wages, hours, and other working conditions, either in the locality involved, or nationally, and so that no unwarranted prejudice will occur to other Local Unions.

Section 32 (E) (1)

(E) 1. . . . No Local Union shall engage in a strike or other economic measures without first receiving the authorization of the International President and otherwise complying with the applicable provisions of this section.

Supreme Court, U.S.
FILED
MAY 18 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1476

In the Supreme Court of the United States

OCTOBER TERM, 1989

SEATTLE-FIRST NATIONAL BANK, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether substantial evidence supports the National Labor Relations Board's determination that when a certified independent union became a local affiliate of an international union, there was sufficient continuity between the independent union and the local affiliate to require petitioner to bargain with the local affiliate.

2. Whether the National Labor Relations Board properly denied petitioner's request to schedule a supplemental hearing to consider post-hearing developments.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	8
Conclusion	14

TABLE OF AUTHORITIES

Cases:

American Bridge Div., U.S. Steel Corp. v. *NLRB*, 457 F.2d 660 (3d Cir. 1972) 7, 10, 11

Amoco Production Co., 239 N.L.R.B. 1195 (1979) 8

Amoco Production Co. v. *NLRB*, 613 F.2d 107 (5th Cir. 1980) 2, 3, 8

Franks Brothers Co. v. *NLRB*, 321 U.S. 702 (1944) (1964) 6, 13

Garlock Equipment Co., 288 N.L.R.B. No. 31 (Mar. 25, 1988) 10

L'Eggs Production, Inc. v. *NLRB*, 619 F.2d 1337 (9th Cir. 1980) 6

May Department Stores Co. v. *NLRB*, No. 88-3302 (7th Cir. Feb. 28, 1990) 9, 11

NLRB v. *Bernard Gloekler North East Co.*, 540 F.2d 197 (3d Cir. 1976) 7, 10, 11

NLRB v. *Cutter Dodge, Inc.*, 825 F.2d 1375 (9th Cir. 1987) 13

NLRB v. *Financial Institution Employees, Local No. 1182*, 475 U.S. 192 (1986) 3, 5, 7, 8, 9, 10, 11, 12, 13

NLRB v. *Financial Institution Employees, Local No. 1182*, 752 F.2d 356 (9th Cir. 1984) 3

NLRB v. *Insulfab Plastics, Inc.*, 789 F.2d 961 (1st Cir. 1986) 9, 11

Cases—Continued: Page

News/Sun Sentinel Co. v. *NLRB*, 890 F.2d 430 (D.C. Cir. 1989), petition for cert. pending, No. 89-1641 9
Seattle-First National Bank, 265 N.L.R.B. 426 (1982) 3
Sun Oil Co. v. *NLRB*, 576 F.2d 553 (3d Cir. 1978) 6-7, 10, 11
Universal Camera Corp. v. *NLRB*, 340 U.S. 474 (1951) 10
Western Commercial Transport, Inc., 288 N.L.R.B. No. 27 (Mar. 25, 1988) 9

Statutes and regulation:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
§ 8(a)(1), 29 U.S.C. 158(a)(1) 2
§ 8(a)(5), 29 U.S.C. 158(a)(5) 2
§ 9(c)(1), 29 U.S.C. 159(c)(1)) 3
29 C.F.R. 102.48(d)(1) 5, 13

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 892 F.2d 792. The decision and order of the National Labor Relations Board (Pet. App. 24a-33a) is reported at 290 N.L.R.B. No. 72. The order of the National Labor Relations Board denying the motion for a supplemental hearing (Pet. App. 22a-23a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 1989. The petition for a writ of certiorari was filed on March 20, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1970, the National Labor Relations Board certified the FirstBank Independent Employees Association (the

Independent) as the exclusive bargaining representative of petitioner's employees. Petitioner and the Independent thereafter entered into a collective bargaining agreement, which lasted until October 1977. At that time, the Independent's executive council sought to affiliate with the Retail Clerks International Union (the International), and therefore scheduled an affiliation election for February 1978. The Independent informed petitioner's bargaining unit employees that only those who joined the union by January 19, 1978, would be eligible to vote. Pet. App. 3a-4a, 66a.

A majority of the Independent's members voted for affiliation. On April 1, 1978, the International therefore chartered the Independent as the Financial Institution Employees of America, Local 1182 (FIEA). In June, FIEA petitioned the Board to amend its certification to reflect its new name. Petitioner opposed the certification, contending that "the election violated due process by excluding nonmembers and [that] the affiliation broke the continuity of representation required." Pet. App. 4a. The Board held a two-day hearing in late July 1978. In April 1979, the Board granted FIEA's request and amended its certification to reflect the union's new name and affiliation. *Ibid.*; see *id.* at 64a-69a.

2. Petitioner refused to bargain with FIEA. In September 1979, the Board found that such refusal violated Section 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (5), and ordered petitioner to bargain with the union. Pet. App. 54a-62a. Petitioner sought review in the court of appeals, but on the Board's request, the court remanded the case for reconsideration in light of *Amoco Production Co.* v. *NLRB*, 613 F.2d 107 (5th Cir. 1980).[1] On remand, the Board held that because non-

[1] In *Amoco*, the employer refused to bargain with an affiliated union because only union members had been allowed to vote on affiliation.

members were not allowed to vote in the affiliation election, that election was invalid. The Board consequently dismissed the unfair labor practice charges against petitioner and vacated FIEA's amended certification. Pet. App. 25a; see *Seattle-First National Bank*, 265 N.L.R.B. 426 (1982).

On FIEA's petition for review, the court of appeals held that the Board's requirement that nonunion employees be allowed to vote on affiliation questions was inconsistent with the National Labor Relations Act. *NLRB* v. *Financial Institution Employees, Local No. 1182*, 752 F.2d 356 (9th Cir. 1984). On the Board's petition for a writ of certiorari, this Court affirmed the court of appeals' decision, holding that the Board "exceeded its authority under the Act in requiring that nonunion employees be allowed to vote for affiliation before it would order the employer to bargain with the affiliated union." *NLRB* v. *Financial Institution Employees, Local No. 1182* (*FIEA*), 475 U.S. 192, 209 (1986).[2] Since the Board had not reconsidered its continuity determination, and the court of appeals had not addressed that issue, the Court remanded the case for further proceedings. *Id.* at 200 n.7, 209 n.13.

3. In July 1988, the Board issued its decision on remand, determining that "[w]hile some differences exist between the FIEA and the [Independent], these are not 'sufficiently dramatic' to alter the identity of the bargaining representative and raise a question concerning representation." Pet. App. 27a. Accordingly, the Board reinstated its earlier order

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The Board ordered the employer to bargain, but the Fifth Circuit remanded the case for the Board to determine whether affiliation had substantially changed the union. 613 F.2d at 112.

[2] Section 9(c)(1) of the National Labor Relations Act, 29 U.S.C. 159(c)(1), requires the Board to direct an election to determine a union's representative status "if [the Board] has reasonable cause to believe that a question of representation affecting commerce exists * * *."

amending the Independent's certification and ordered petitioner to recognize and bargain with FIEA. *Id.* at 32a-33a.

At the outset, the Board stated that "[i]n each case continuity is determined by a factual comparison between the pre- and post-affiliation representative." Pet. App. 32a. The Board found that, "after the affiliation, [FIEA's] officers, and their responsibilities, remained the same as those who served for [the Independent]." *Id.* at 28a.[3] The Board also found that there had not been any significant changes in eligibility for membership or local office. *Id.* at 29a. The Board noted that the International's constitution permitted FIEA to expand its organizing efforts beyond petitioner's employees. That authority, the Board concluded, was not inconsistent with continuity, since the Independent's executive council had the same power. *Ibid.*

The Board further found that "autonomy essentially remains at the local level, including day-to-day contract administration, handling of grievances, control of collective bargaining, and the calling of strikes." Pet. App. 32a. For example, the Board recognized that, under the International's constitution, the "terms of proposed collective-bargaining contracts must be submitted to the International president for approval *upon request* * * * prior to membership action." *Id.* at 31a. But the Board found that, in practice, the local unions negotiated their own contracts, and that the International provided assistance only on request.

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[3] The Board noted that "[i]n the year since affiliation, there has been a natural turnover of individuals occupying these offices." Pet. App. 28a. The Board discounted that fact, however, since "[t]here is no evidence * * * that replacement of officers was a condition of the affiliation or a result of any action taken by the International." *Id.* at 28a-29a. In fact, two of the three pre-affiliation officers stopped working for petitioner before the July 1978 hearing. *Id.* at 18a. FIEA replaced those officers according to the pre-affiliation rules. See July 26, 1978, Tr. 58, 242.

Ibid. Similarly, although the International's constitution empowers the International to place a local in trusteeship, the Board found that the International had exercised that authority only in the most extraordinary circumstances. *Id.* at 31a n.11.[4] After the Board's initial decision, petitioner filed a motion for reconsideration, asking the Board to schedule a supplemental hearing to consider alleged additional post-affiliation developments in the certified union. The Board denied that motion. Pet. App. 22a-23a & n.3. The Board declined to depart from its established practice against reopening a record to receive evidence of events that occurred after the hearing, see 29 C.F.R. 102.48(d)(1), particularly where, as here, petitioner's evidentiary proffer "does not contain information that even if credited would require the Board to reach a different result." Pet. App. 23a n.3.

3. The court of appeals enforced the Board's bargaining order and denied the petition for review filed by Seattle-First National Bank. Pet. App. 1a-21a. In the court of appeals, petitioner contended that the Board's "setting a hearing four months after an affiliation [did] not allow [petitioner] enough time to prove that changes have occurred, since a 'devious' International could present a facade for

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[4] Petitioner also contended that, under *NLRB* v. *Financial Institution Employees, Local No. 1182*, 475 U.S. 192, 209 (1986), the Board should include, "as part of a due process component of the continuity inquiry, a general examination of 'the extent of [employee] opposition to the affiliation.' " Pet. App. 27a n.10. The Board rejected that contention, stating that such an inquiry would be "tantamount to the Board's conducting an informal poll * * * among those employees to whom, the Court held, no opportunity to vote in the affiliation election need be extended." *Id.* at 27a-28a n.10. The Board noted that, apart from the continuity inquiry, a question of representation "may still be raised in the traditional manner, by a timely employee-filed decertification petition or by proof [by the employer] of objecti[ve] considerations for good faith doubt." *Id.* at 28a n.10.

that long." *Id.* at 10a. The court rejected that claim, noting that, under petitioner's theory, a "devious union might be able to put up a front for even longer." *Ibid.* The court found that "[t]he hearing on the amendment to certification was the most expeditious and efficient proceeding in the twelve-year saga of this litigation." *Ibid.* The court therefore declined to "fault the Board for expedition." *Ibid.*

Moreover, the court determined that even if petitioner's argument had merit in the abstract, it collapsed on the facts of this case. Here, the July 1978 hearing "offered ample opportunity [for petitioner] to make its case on the issue of continuity," Pet. App. 10a, and petitioner "made no effort to develop a record * * * on the future changes expected in the relationship among the International, the union, and its members," *ibid.* The court concluded that "[a]ny paucity in the record inheres in the facts themselves, or in [petitioner's] failure to elicit them." Accordingly, the court held that the Board had properly refused to grant petitioner an additional hearing. *Ibid.*[5]

Turning to petitioner's challenge to the Board's continuity determination, the court of appeals stated that "[t]he ultimate question is whether the union after affiliation operates in substantially the same way as it did before affiliation." Pet. App. 15a.[6] Reviewing the record, the court

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[5] Petitioner pressed (Pet. App. 6a-7a) the court of appeals to review the Board's continuity determination in light of events that occurred after the Board's decision, *i.e.*, FIEA's merger with a local of the United Food and Commercial Workers International in 1988. Given established precedent precluding endless expansion of the record in bargaining cases, see, *e.g.*, *Franks Brothers Co.* v. *NLRB*, 321 U.S. 702 (1944); *L'Eggs Products, Inc.* v. *NLRB*, 619 F.2d 1337 (9th Cir. 1980), the court of appeals refused to consider such additional evidence. Pet. App. 7a.

[6] In the court of appeals, petitioner challenged (Pet. App. 12a-13a) the Board's approach in resolving continuity issues as inconsistent with a series of Third Circuit decisions. See, *e.g.*, *Sun Oil Co.* v. *NLRB*,

found substantial evidence in support of the Board's determination that, "although the affiliation brought changes, * * * the new union retained enough of its old character to render those changes insufficiently dramatic to warrant a finding that there could be a question of representation." *Id.* at 20a. "[A]ccord[ing] substantial deference both to the Board's choice of relevant factors and to the weights the Board assigns those factors,"[7] the court concluded that there "[was] no reason to upset the Board's calculus." *Ibid.*

Finally, the court of appeals rejected petitioner's contention that the Board "should have considered evidence regarding employee support for affiliation as a factor in determining continuity." Pet. App. 20a. The court observed that petitioner was "essentially trying to fight the same battle that it lost in the Supreme Court [in *FIEA*]," since that decision held that "affiliation is an internal union affair so long as continuity is maintained." *Ibid.* Moreover, the court pointed out that the "flaw in [petitioner's] reasoning is that it assumes an employee's vote for affiliation is evidence of his or her feeling that the new union will be substantially

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576 F.2d 553 (1978); *NLRB* v. *Bernard Gloekler North East Co.* v. *NLRB*, 540 F.2d 197 (1976); *American Bridge Div., U.S. Steel Corp.* v. *NLRB*, 457 F.2d 660 (1972). In those decisions, the Third Circuit suggested that the Board should weigh such factors as increased size, financial support, and bargaining power. The court of appeals concluded that petitioner erred in relying on case law predating this Court's decision in *FIEA*, since the Court's comments in that decision regarding the Board's approach in resolving continuity issues (475 U.S. at 199-200) "strongly suggest[ ] that certain changes inhere in affiliation and should not be accorded significant weight in deciding the question of continuity." Pet. App. 12a.

[7] For example, the court accepted the Board's view that the International's established practices, rather than the letter of the constitutional provisions, were relevant to the continuity inquiry. Pet. App. 15a-16a.

the same as the old. There is simply no basis for attributing that motive to a vote." *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 8-20) that the Board erred in determining that there was sufficient continuity between the certified independent union and the successor local union to require petitioner to bargain with the local union. Under its established practice, the Board amends the certification of a newly affiliated local union to reflect its new name unless the change raises a question of representation.[8] As this Court has recognized, such a change is principally an internal union matter that "does not create a new organization, nor does it result in the dissolution of an existing organization." *FIEA*, 475 U.S. at 206 (quoting *Amoco Production Co.*, 239 N.L.R.B. 1195 (1979)). Rather, "[t]he Act assumes that stable bargaining relationships are best maintained by allowing an affiliated union to continue representing a bargaining unit unless the Board finds that the affiliation raises a question of representation." *FIEA*, 475 U.S. at 209. And an affiliation raises a question of representation, only where the "organizational and structural change[s] * * * may substantially change a certified union's relationship with the employees it represents." *FIEA*, 475 U.S. at 202.

In making that factual determination, the Board compares the pre- and post-affiliation representative to decide whether the changes were "sufficiently dramatic" to alter

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[8] As the court of appeals stated, "[a] 'question of representation' is defined as sufficient doubt about the union's continuing status as the legitimate representative of employees in a particular unit that a new election should be conducted to determine employee sentiment." Pet. App. 11a.

"the fundamental character of the representing organization." *Western Commercial Transport, Inc.*, 288 N.L.R.B. No. 27 (Mar. 25, 1988), slip op. 13, 14 (quoting *FIEA*, 475 U.S. at 206). Consequently, the Board considers a range of factors, including the continued leadership responsibilities of the existing union officials, the perpetuation of membership rights and duties, the continuation of the manner in which contract negotiations, administration, and grievance processing are effectuated, and the preservation of the certified representative's assets, books, and physical facilities. *E.g.*, *Western Commercial Transport, Inc.*, slip op. 11. And the courts of appeals have expressly endorsed the Board's fact-specific approach. See, *e.g.*, *May Department Stores Co.* v. *NLRB*, No. 88-3302 (7th Cir. Feb. 28, 1990), slip op. 12-14; *News/Sun Sentinel Co.* v. *NLRB*, 890 F.2d 430, 432 (D.C. Cir. 1989), petition for cert. pending, No. 89-1641; *NLRB* v. *Insulfab Plastics, Inc.*, 789 F.2d 961, 966-967 (1st Cir. 1986).

Here, the Board followed that approach and found that the Independent, after affiliation, had not surrendered control over the important decision-making and representational functions. In other words, the record showed that "autonomy essentially remains at the local level, including day-to-day contract administration, handling of grievances, control of collective bargaining, and the calling of strikes." Pet. App. 32a.[9] In these circumstances, the Board properly determined that there was sufficient continuity between the certified independent union and the local union created

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[9] Petitioner chastises the Board for not considering "the documented shifts in power and control that occur when, for example, a former independent gives an international the right to approve strikes." Pet. 13. That criticism is wide of the mark. Here, the Board expressly found that the affiliated local could strike without the International's approval and that the International could not force the affiliated local to participate in a strike. Pet. App. 31a.

after affiliating with the international to require petitioner to bargain with the local union. Accordingly, further review of petitioner's fact-specific challenge to the Board's decision is not warranted. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).[10]

2. Petitioner also contends (Pet. 10-14) that the decision below conflicts with a series of Third Circuit decisions. *E.g.*, *Sun Oil Co.* v. *NLRB*, 576 F.2d 553 (1978); *NLRB* v. *Bernard Gloekler North East Co.*, 540 F.2d 197 (1976); *American Bridge Div., U.S. Steel Corp.* v. *NLRB*, 457 F.2d 660 (1972). In those decisions, which predated *FIEA*, the Third Circuit suggested that the Board, in making continuity determinations, should weigh such factors as increased size,

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[10] Petitioner criticizes the Board's multi-factor approach on the grounds that it creates "a *per se* test * * * designed to show continuity in every affiliation case," Pet. 14, and that it also improperly "concentrate[s] on apparent continuity in easily manipulated and superficial administrative details * * *," *id.* at 15. But petitioner's cited examples (Pet. 14) put to rest its curious assertion that the Board has found continuity in every affiliation case. See, *e.g.*, *Garlock Equipment Co.*, 288 N.L.R.B. No. 31 (Mar. 25, 1988), slip op. 8.

Moreover, it is petitioner, and not the Board, that advocates an inflexible standard. Petitioner asserts that the Board must focus on the loss of "employer-specific goals [and] full freedom and autonomy" when "small, independent unions" affiliate. Pet. 20. If followed, that position would be tantamount to a rule that affiliation, by itself, would raise a question of representation in all cases. But in *FIEA*, the Court eschewed such an approach. As this Court recognized, "[a] local union may seek to affiliate with a larger organization for a variety of reasons," including the desire to obtain "bargaining expertise or financial support, or [to] compensate for a lack of leadership within the local union." *FIEA*, 475 U.S. at 199 n.5. The Court therefore pointed out that the Act authorizes the Board to conduct a representation election, as a consequence of affiliation, "*only* where affiliation raises a question of representation." *Id.* at 203.

financial support, and bargaining power. See, *e.g.*, *Sun Oil Co.*, 576 F.2d at 557; *Gloekler*, 540 F.2d at 202; *American Bridge*, 457 F.2d at 663-664.

To the extent those decisions suggest that changes inherent in affiliation preclude a finding of continuity, the cases are not consistent with this Court's decision in *FIEA*. In *FIEA*, the Court recognized that the increased size, financial support, and bargaining power that affiliations create are the ordinary, valid reasons for such mergers. 475 U.S. at 198-199 & n.5. Given this state of affairs, the Court made plain that the Act authorizes the Board to conduct a representation election, as a consequence of affiliation, "*only* where affiliation raises a question of representation," *id.* at 203, *i.e.*, where there is actual evidence of loss of continuity without taking into account such ordinary reasons for affiliation. Since the Third Circuit has not had an opportunity to reconsider those decisions in light of *FIEA*, further review of the present case would be premature.[11]

3. Petitioner further contends (Pet. 20-24) that the Board erred in refusing to consider evidence of employee opposition to continued representation by the affiliated union. Petitioner claims that "[i]f the represented employees *believe* that an affiliation has substantially changed their relationship with the certified union, the Board should not

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[11] Indeed, as petitioner points out (Pet. 13 n.3), other circuits have questioned the continued validity of the Third Circuit case law in light of *FIEA*. See *May Department Stores Co.* v. *NLRB*, No. 88-3302 (7th Cir. Feb. 28, 1990), slip op. 14 n.9; *NLRB* v. *Insulfab Plastics, Inc.*, 789 F.2d 961, 967-968 (1st Cir. 1986).

In any event, in *American Bridge*, 457 F.2d at 663-664, and *Gloekler*, 540 F.2d at 199-202, the Third Circuit relied in part on provisions in the international unions' constitutions in determining that the affiliated locals had lost autonomy. Here, by contrast, the record showed that the international union's established practice was to refrain from exercising the full range of its constitutional powers. See, *e.g.*, Pet. App. 31a. For that reason, the decision below is consistent with *American Bridge* and *Gloekler*.

be allowed to disregard that sentiment and conclude that changes are inconsequential." Pet. 22. But that issue is not presented here. As the court of appeals pointed out, Pet. App. 20a, the principal basis of petitioner's claim of employee dissatisfaction is the affiliation vote, in which roughly 40% of the union members voted against affiliation. Yet there is no reason to assume—and the record contains no basis for inferring—that employees who vote against a particular affiliation do so because they believe the union will be dramatically changed.

Petitioner also appears to argue that the Board, as part of its continuity inquiry, must take into account employee sentiment toward affiliation. This Court's decision in *FIEA* forecloses that claim. There, the Court held that the Board could not require, as a prerequisite to a union's obtaining an amended certification, that all unit employees be afforded the right to vote on an affiliation. 475 U.S. at 209. The Board's consideration of employee sentiment in its continuity inquiry would thus amount to an end run around the Court's express holding in *FIEA*.[12]

4. Finally, petitioner renews its contention (Pet. 24-27) that the Board erred in denying petitioner's request to schedule a supplemental hearing to consider post-hearing changes in the certified union. The Board's rule precluding consideration of such post-hearing events discourages employers from using protracted litigation to strengthen

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[12] Petitioner relies (Pet. 20-21) on the Court's statement that "[t]hese changed circumstances may in turn raise a 'question of representation,' if it is unclear whether a majority of employees continue to support the reorganized union." 475 U.S. at 202. Petitioner is mistaken, since that statement in context refers only to a situation where the Board finds that a new affiliation has "change[d] a certified union's relationship with the employees it represents." *Ibid.* The Court was not suggesting that employee sentiment would be relevant to the threshold determination whether a substantial change in continuity had occurred.

their case. Cf. *Franks Brothers Co.* v. *NLRB*, 321 U.S. 702, 703-706 (1944).[13] In order to allow the bargaining relationship to continue without being subjected to repeated challenges based on any change that may occur, the Board properly bases a continuity determination on facts adduced at the time of the initial hearing. This practice is consonant with the strong policy favoring industrial stability that animated this Court's decision in *FIEA*, 475 U.S. at 202-203. And if substantial post-hearing changes in the union make a significant number of unit employees dissatisfied with their representative, those employees may file a decertification petition, as they may when they are dissatisfied with any action by an incumbent union. See *id.* at 205.[14]

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[13] Under 29 C.F.R. 102.48(d)(1), newly discovered evidence is grounds for a new hearing only if the evidence existed at the time of the original hearing, the party's failure to adduce it was excusable, and the evidence would have made a material difference in the decision. See, *e.g.*, *NLRB* v. *Cutter Dodge, Inc.*, 825 F.2d 1375, 1381 (9th Cir. 1987).

[14] In any event, the Board specifically found here that petitioner's proffered evidence, if credited, would not have changed the Board's continuity determination. See Pet. App. 23a n.3. On the record presented, that sort of factual issue does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

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OCTOBER TERM, 1989

SEATTLE-FIRST NATIONAL BANK,
Petitioner,

v.

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FINANCIAL INSTITUTION EMPLOYEES OF AMERICA,
LOCAL NO. 1182,
CHARTERED BY UNITED FOOD & COMMERCIAL WORKERS
INTERNATIONAL UNION, AFL-CIO,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

	Page
REASONS FOR GRANTING THE WRIT	1
I. THIS CASE PRESENTS AN IMPORTANT QUESTION REGARDING THE BOARD'S CONTINUITY TEST IN AFFILIATION CASES	2
II. THIS IS AN APPROPRIATE CASE FOR THE COURT TO DETERMINE WHETHER THE BOARD SHOULD CONSIDER EMPLOYEE SENTIMENT IN EXAMINING CONTINUITY	7
III. THIS CASE PRESENTS AN IMPORTANT QUESTION CONCERNING AN EMPLOYER'S RIGHT TO A HEARING ON POST-AFFILIATION CHANGES	8
CONCLUSION	10

TABLE OF AUTHORITIES

Cases Page

American Bridge Div., U.S. Steel Corp. v. NLRB, 457 F.2d 660 (3d Cir. 1972) 6

Garlock Equipment Co., 288 N.L.R.B. No. 31 (Mar. 25, 1988) 3

Hansen v. Guyette, 814 F.2d 547 (8th Cir. 1987) 5, 6

Independent Drug Store Owners of Santa Clara County, 211 N.L.R.B. 701 (1974), *aff'd sub nom. Retail Store Employees, Local 428 v. NLRB*, 528 F.2d 1225 (9th Cir. 1975) 2

Missouri Beef Packers, Inc., 175 N.L.R.B. 1100 (1969) 2

Mosler Safe Co., 210 N.L.R.B. 934 (1974) 7

NLRB v. Bernard Gloekler North East Co., 540 F.2d 197 (3rd Cir. 1976) 6

NLRB v. Financial Institution Employees of America, Local No. 1182 ("FIEA"), 475 U.S. 192 (1986) ..... *passim*

NLRB v. Insulfab Plastics, 789 F.2d 961 (1st Cir. 1986) 5

NLRB v. Metropolitan Life Insurance Co., 380 U.S. 438 (1965) 8

Parks v. International Brotherhood of Electrical Workers, 314 F.2d 886 (4th Cir.), *cert. denied*, 372 U.S. 976 (1963) 4, 5

Seattle-First National Bank v. NLRB, 892 F.2d 792 (9th Cir. 1989) 9

Sun Oil Co. v. NLRB, 576 F.2d 553 (3d Cir. 1978) 6

Statutes

29 U.S.C. § 159(e) 9

Other

Barbash, "Power and the Pattern of Union Government," 9 Lab. L.J. 628 (1958) 4

Summers, "Legal Limitations on Union Discipline," 64 Harv. L. Rev. 1049 (1951) 5

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REPLY BRIEF OF PETITIONER

Seattle-First National Bank submits this Reply Brief in support of its Petition for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on December 20, 1989.

REASONS FOR GRANTING THE WRIT

Rather than focus on the criteria for granting certiorari, the National Labor Relations Board's brief in opposition argues the merits of the underlying substantive issues. The Board's arguments, however, only scratch the surface of the questions raised by Seafirst's petition.

Because of the importance of those questions in the Board's administration of the National Labor Relations Act, the Court should grant the petition and resolve this case on its merits.

I. THIS CASE PRESENTS AN IMPORTANT QUESTION REGARDING THE BOARD'S CONTINUITY TEST IN AFFILIATION CASES.

Seafirst's petition principally challenges the Board's use of a continuity test that results in approval of every affiliation through which an independent union becomes a separate local of an international. The Board's answer to this point appears in a footnote, in which it characterizes as "curious" Seafirst's observation that its criteria are result-oriented.[1] Bd. Br. at 10, n. 10. Despite this cavalier response, the fact is that the Board has *never* found that an affiliation, standing alone, causes discontinuity. Instead, it has found a post-affiliation disruption of continuity *only* when a new affiliate has become a part of an existing local body that seeks to assume representation, *e.g.*, *Independent Drug Store Owners of Santa Clara County*, 211 N.L.R.B. 701 (1974), *aff'd sub nom. Retail Store Employees, Local 428 v. NLRB*, 528 F.2d 1225 (9th Cir. 1975), or when the affiliation has caused a schism, *e.g.*, *Missouri Beef Packers, Inc.*, 175 N.L.R.B. 1100 (1969). In those cases the mergers and the schisms

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[1] Apart from this footnote, the Board's argument consists of a recitation of its continuity criteria and a recapitulation of its findings. Bd. Br. at 9-10. This case is not, however, a "fact-specific challenge to the Board's decision," rendering most of its response irrelevant. Bd. Br. at 10. Even as far as the facts are concerned, the Board sometimes misses the mark. For example, it asserts that "[a] majority of the Independent's members voted for affiliation." Bd. Br. at 2. In fact, 2624 ballots were mailed to voters (out of a unit of 4790 employees); 1206 ballots, substantially less than 50% of those mailed, were returned in favor of affiliation. Tr. 74; Exs. P-14, P-15.

—not the affiliations—have prompted findings of discontinuity.[2]

This uniform result is no mere coincidence. In its petition, Seafirst explained how the Board's criteria, which focus on day-to-day administrative factors, inevitably lead to the conclusion that every affiliation unaccompanied by a merger or schism preserves continuity. *See* Pet. at 15-19. This disguised *per se* test might be excusable if continuity always existed when an independent union became a separate local of an international. Even in the case of such a "pure" affiliation, however, meaningful losses of autonomy sometimes destroy continuity. In other words, as an empirical matter an affiliation, without more, *can* disrupt continuity, even though the Board's criteria forbid that conclusion.

The experience of employees at the Bunker Hill mines illustrates this point, demonstrating that affiliation standing alone can substantially change "the certified union's relationship with the employees it represents." *See NLRB v. Financial Institution Employees of America, Local No. 1182 ("FIEA")*, 475 U.S. 192, 202 (1986). In that situation, described in Seafirst's petition, the Bunker Hill independent union affiliated with the Steelworkers, which reserved in its constitution the right to veto contracts approved on the local level—just as the RCIU did here. Years after the affiliation, the local's members approved a wage-cutting agreement to keep the mines open. The International then vetoed that agree-

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[2] Citing *Garlock Equipment Co.*, 288 N.L.R.B. No. 31 (Mar. 25, 1988), the Board implies that it has found a disruption of bargaining relationships absent a merger or schism. Bd. Br. at 10, n.10. Contrary to the Board's implication, however, that case did not involve a newly formed local affiliate seeking an amended certification. Rather, following the independent's affiliation in *Garlock*, a District Lodge of the Machinists Union, which already represented more than 10,000 employees, sought an amended certification in lieu of the independent. *See Garlock*, slip op. at 4.

ment, directly leading to a shut-down of the mines and a substantial loss of employment.[3]

The Steelworkers local at Bunker Hill manifestly was not the "same" union as the independent whose members voted in favor of the contract, especially in terms of its "relationship with the employees it represents." *FIEA*, 475 U.S. at 202. The Bunker Hill situation thus demonstrates that affiliation, without any merger or schism, can create a new and different union from the perspective of the represented employees. Given that fact, the Board's continuity test is ineffective unless it attempts to distinguish between those "pure" affiliations that preserve continuity and those that do not, such as the one at Bunker Hill. In practice, however, as Seafirst showed in its petition, the Board's criteria give no weight to the kinds of changes that occurred upon affiliation at Bunker Hill. Significantly, the Board does not deny that an affiliation of the type that occurred there will always pass muster under its criteria, nor does it so much as discuss the application of its criteria to "pure" affiliations.

The Board instead tries to recast the issues as factual in nature, asserting that the Board has found that "autonomy essentially remains at the local level" and that Local 1182 "could strike without the International's approval." Bd. Br. at 9 & n.9. As a matter of fact, however, the Board in its decision acknowledged "that the International constitution confers broad and pervasive powers," Pet.App. 31a, n.11, and that any strike "must

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[3] The theory behind such a veto power is that local unions should not be permitted to make "a collective bargaining decision which seriously prejudices larger interests in the union." *Parks v. International Brotherhood of Electrical Workers*, 314 F.2d 886, 907 (4th Cir.), *cert. denied*, 372 U.S. 976 (1963), quoting Barbash, "Power and the Pattern of Union Government," 9 Lab. L.J. 528, 633 (1958). While this rationale explains the restrictions appearing in the Steelworkers (and the RCIU) constitution, it hardly mitigates the impact of the transfer of power on the independent's membership.

also have the approval of the International president." Pet.App. at 30a-31a. The Board simply decided to ignore these facts, asserting that the penalty for unauthorized strikes is generally modest, and that the International's veto power over contracts is justifiable to protect against "sweetheart contracts that result in injury to other locals." Pet.App. 31a.[4] By thus minimizing these "broad and pervasive powers," the Board has declined *as a matter of law* to give any weight to the kinds of changes that lost the Bunker Hill workers their jobs, the very kinds of changes that dramatically alter the "certified union's relationship with the employees it represents." *FIEA*, 475 U.S. at 202.

To remedy these flaws in the Board's criteria, its test must be revised to focus on transfers of power, rather than superficial and easily manipulated administrative details. *See* Pet. at 20. The Board protests that Seafirst's "position would be tantamount to a rule that affiliation, by itself, would raise a question of representation in all cases." Bd. Br. at 10 & n.10. That is not true. If an affiliation occurred in which an independent obtained "bargaining expertise or financial support, or [could] compensate for a lack of leadership within the local union," *FIEA*, 475 U.S. at 199, n.5, without ceding to an international veto power over the union's most vital decisions, continuity would exist. *See NLRB v. Insulfab Plastics*, 789 F.2d 961, 968 (1st Cir. 1986) ("not every international exerts the same degree of control over its member locals"). In this case, however, when the Independent "voluntarily affiliated with the International, it

[4] In fact, the ultimate penalty has been imposed on locals who strike in defiance of International orders. *See*, e.g., *Hansen v. Guyette*, 814 F.2d 547 (8th Cir. 1987) (trusteeship); *Parks v. IBEW*, 314 F.2d at 901 (revocation of charter). The impact of those severe sanctions is not lost on other locals, as a "few well-placed, severe penalties can mark the danger lines which cautious union members will not dare to cross." Summers, "Legal Limitations on Union Discipline," 64 Harv. L. Rev. 1049, 1050 (1951).

bargained away a measure of control over its activities in exchange for the strength it received." *Hansen v. Guyette*, 814 F.2d 547, 551 (8th Cir. 1987) (describing impact of UFCW constitution). The Board's criteria ignore that cession of final control.

This case thus presents a question of law vital to the Board's administration of the Act: Does the Board's continuity test, as applied to pure affiliations, address the proper factors? The answer is no. The Board has developed a test suitable to examine mergers and similar organizational transactions, which often occur within a single international and in which administrative changes may provide insight into more significant issues. That same test, however, gives no inkling of the institutional transformation that an affiliation, without any merger or schism, can accomplish. This Court should therefore grant certiorari and require the Board to develop a continuity test designed to illuminate the changes that can accompany a pure affiliation.[5]

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[5] In its petition, Seafirst pointed out that its view of the continuity inquiry finds support in a trilogy of Third Circuit decisions. *See American Bridge Div., U.S. Steel Corp. v. NLRB*, 457 F.2d 660 (3d Cir. 1972); *NLRB v. Bernard Gloekler North East Co.*, 540 F.2d 197 (3d Cir. 1976); *Sun Oil Co. v. NLRB*, 576 F.2d 553 (3d Cir. 1978). Because the Third Circuit has not assessed the impact of this Court's decision in *FIEA*, the Board argues that review of this case would be "premature." Bd. Br. at 11. As Seafirst has explained, however, the Third Circuit's test, though first adopted in 1972, conforms to this Court's approach in *FIEA*. It is hardly "premature" for this Court to accept certiorari to clarify that its own decision in *FIEA* requires the Board to adopt criteria more closely approximating those applied by the Third Circuit. The Board also claims that "the decision below is consistent with *American Bridge* and *Gloekler*." Bd. Br. at 11, n.11. This claim of consistency is misguided, as even a cursory review of the two cases discloses.

II. THIS IS AN APPROPRIATE CASE FOR THE COURT TO DETERMINE WHETHER THE BOARD SHOULD CONSIDER EMPLOYEE SENTIMENT IN EXAMINING CONTINUITY.

The Board asserts that this case does not present an issue as to whether it should consider employee sentiment in examining continuity, arguing that "there is no reason to assume" that the 774 union members who voted against affiliation did so "because they believe the union will be dramatically changed." Bd. Br. at 12. When not taking an adversarial position, however, the Board has considered the extent of internal opposition to affiliation to be probative of a bargaining unit's views. *Mosler Safe Co.*, 210 N.L.R.B. 934, 935 (1974). This makes sense, as an affiliation election marked by controversy and broad opposition more likely signifies a substantial change in "a certified union's relationship with the employees it represents," *FIEA*, 475 U.S. at 202, than it does a simple change in the union's name. In this case, apart from the evidence of the vote itself, hundreds of Seafirst employees protested their exclusion from the affiliation decision, after a vigorous campaign that revolved around questions of union autonomy. *See* Pet. at 23, n.9. A realistic appraisal of the record establishes that, in the eyes of Seafirst employees, affiliation was a controversial issue implicating the very nature of their bargaining representative.

These facts present, as clearly as any case will, the question whether the Board should consider evidence of employee views in assessing continuity. In its decision (in contrast to its brief), the Board never denied the probative value of this evidence. It simply found that *FIEA* foreclosed any consideration of employee sentiment. Pet. App. 27a, n.10. In fact, however, giving weight to the unit's views does not accomplish "an end run around the Court's express holding in *FIEA*," Bd. Br. at 12, as the

Board claims. So long as employee sentiment is not deemed dispositive, *FIEA* permits its consideration as one piece of evidence in the continuity inquiry. *Cf. NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 441-42 (1965) (although Congress forbade Board from using extent of organization as controlling factor in determining unit, it could be considered as one factor). The Board's refusal to entertain evidence of sentiment will doubtless recur, as an affiliation case by its nature includes some indicia of the unit's views. The Court should thus grant the writ to determine whether the Board has acted rationally in declining to consider this valuable evidence.

III. THIS CASE PRESENTS AN IMPORTANT QUESTION CONCERNING AN EMPLOYER'S RIGHT TO A HEARING ON POST-AFFILIATION CHANGES

The Board argues that it properly denied Seafirst a hearing on the General Counsel's 1979 summary judgment motion, citing the need to "discourage[] employers from using protracted litigation to strengthen their case," and invoking the specter of "repeated challenges based on any change that may occur." Bd. Br. at 12-13. Seafirst advocates neither "protracted litigation" nor "repeated challenges." All Seafirst ever wanted was a hearing and the issuance of subpoenas in 1979, when it was first charged with an unfair labor practice. *See* Pet. at 25.[6]

Rather than grant Seafirst a hearing, the Board confined its decisionmaking to evidence adduced four months

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[6] As one would expect, the Board claims that none of the evidence proffered by Seafirst in 1979 would have made any difference. Bd. Br. at 13, n.14. One can only speculate, however, as to what Seafirst could have unearthed at a hearing, with the assistance of the requested subpoenas. Further, the Board's 1986 decision alluded to some of the very issues raised by Seafirst in 1979, establishing that these points at least played a role in the Board's thinking. *See* Pet. at 25.

after the 1978 affiliation. Despite the absence of any track record, the Board decided "that the focus should be on how the union has functioned in practice under" the International constitution, Pet. App. 15a, and gave short shrift to the one piece of evidence—the constitution itself—that could have been meaningful without the passage of time.[7] By thus focusing on practice, while refusing to grant a hearing after the practice became known, the Board imposed on Seafirst the absurd burden of proving *future* events, *i.e.*, "the future changes expected in the relationship" between the new affiliate and its parent. *Seattle-First National Bank v. NLRB*, 892 F.2d 792, 797 (9th Cir. 1989). Not even the Board defends the rationality of conducting a hearing on such speculative issues. Unless this Court grants certiorari, however, employers challenging continuity will have no choice but to try hypothetical cases, in the manner suggested by the court below.[8]

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[7] If the Board's continuity inquiry focused on transfers of power, it could examine the structural changes accomplished by the documents effecting the affiliation, without awaiting further developments. Thus, the analysis advocated by Seafirst would dispense with the need for a later hearing.

[8] The Board downplays the prospect of subsequent changes in the bargaining representative because dissatisfied employees "may file a decertification petition." Bd. Br. at 13. This assertion ignores the obstacles confronting employees wishing to oust an incumbent union. In this case, a decertification effort would have required employee-sponsored decertification petitions bearing the signatures of 1437 Seafirst employees, 30% of the unit. 29 U.S.C. § 159(e). *See* Tr. 74 (unit consisted of 4790 employees). This is 230 employees more than voted in favor of the affiliation.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

DATED this 31st day of May, 1990.

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